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Volume V

The Wrongs of Corporations; Beneficial Associations; the Rights of Married Persons; What is a Marriage; the Husband's Guardianship; Rights of Property; Support and Separation; the Rights of Parents and Children; Minors; Guardianship; Employers and Employees; Wrongs

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P. F. COLLIER & SON CORPORATION

NEW YORK

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PRINTED IN THE UNITED STATES
AT
THE COUNTRY LIFE PRESS, GARDEN CITY, N. Y.

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CHAPTER XXVIII (*Continued*)

§ 4. Wrongs of Corporations

1. Corporation may commit a wrong.
2. Malicious suits.
3. Trespass.
4. Criminal suits. Nuisances.
5. Negligence.
6. Statutory offences.
7. Contracts with promoters.
8. When corporation is not responsible for them.
9. Its responsibility by adopting them.
10. Corporation cannot ratify such a contract.
11. Relation between shareholders and corporation.
12. Courts will adequately protect them.
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14. Shareholders cannot dictate policy to directors.
15. In some cases may demand their removal.
16. Must make demand before suing.
17. Complainant must be qualified to sue.
18. Estate of corporation is continuing.
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20. Limitations on right of purchase.
21. Shareholder cannot recover for non-performance of duty.

22. Distinction between individual and corporate rights of shareholders.
23. Remedy for impairment of value of stock.
24. Remedy when refusing to pay dividends.
25. Shareholder's right to inspect books.
26. Rights of minority holders.

1. As a corporation is impersonal, it cannot possibly commit a wrong or tort, like a natural person who cannot commit slander by deputy. But a corporation, through its agents, may commit a wrong or tort like an individual. Once, indeed, in law, a corporation had no soul, was not a being in the sense of possessing a moral quality, and therefore quite incapable of doing wrong. At last, the courts learned that officers of corporations too often assaulted persons; published libels; made wrongful representations; in short, committed numerous misdeeds for the corporations they represented. Having learned these things, legal tribunals everywhere now hold that a corporation, through its officers and agents, can commit almost any kind of wrong for and in behalf of the corporation they represent and render it liable therefor.

2. The mental attitude also of its servants may be imputed to the corporation; therefore it may be guilty of malice, may be punished for a libel, for a malicious criminal prosecution, or for a malicious attachment and for conspiracy, false representation, other acts, and the like. Indeed, a corporation may be held liable, not only for actual damages resulting from a

malicious wrong, but even for exemplary damages in cases where a natural person would be held liable.

3. Again, should a majority of the stockholders by vote direct an agent to enter unlawfully on the land of another, the corporation would be guilty of trespass. So, too, a corporation, like a natural person, is liable for any act committed by its servants in the conduct of its business and in the course of its employment.

4. Again, a corporation may be criminally responsible for an omission to perform a duty imposed by law. In some states, not in all, it may be criminally responsible for maintaining a nuisance. An indictment will lie against a corporation for misfeasance as well as for non-feasance, provided the offense contains no criminal element. Thus, corporations have been repeatedly held liable for a nuisance by obstructing a navigable river or other public highway. A corporation has been indicted for a nuisance in keeping a disorderly house and for permitting gambling on its premises.

5. Again, a corporation is liable for the negligence of its servants or agents to perform any duty which ought to be done by the corporation itself. Thus, a railroad company is liable for negligence in running its trains or for keeping its premises in an unsafe condition.

6. By statute also corporations are made liable for the wrongs committed by their officers. Thus, a national bank officer who certifies a check without enough

money on deposit to pay it violates the law and is liable to prosecution and imprisonment.

7. Some important questions have arisen between a corporation and its promoters, who have been efficient in creation. The word promoter has no technical legal meaning and applies to any person who takes an active part in aiding the formation of a company.

8. A corporation is not responsible for the acts performed or the contracts made before it came into existence by promoters or other persons assuming to bind in advance the company. It cannot be held liable on any legal principle whatever, for the reason that no relationship can exist between the two until the company has been formed.

9. A corporation may become responsible for the acts of a promoter and his contracts by subsequently adopting them. Such action is not a ratification for the simple reason that the company cannot ratify, but the effect is the same. The company becomes responsible through adoption.

The offer implied in the agreement with promoters assuming to act in behalf of the proposed corporation may be accepted by the latter, either at the time of its formation or afterward. Says Morawetz, if the charter or articles of association of a company refer to the agreement and provide that the company shall become a part thereof, it is evident that the agreement would be binding upon the company from its inception by reason of the unanimous consent of the shareholders. A similar rule applies when two companies form a new company by consolidation, and this

is made a party to the contracts of the old company by an agreement of consolidation.

The adoption of an agreement made by promoters may often be implied from the acts or acquiescence of the corporation or its agents without express acceptance. After a corporation has knowingly received the benefit of such an agreement it is bound thereby.

10. A corporation cannot ratify the acts of a promoter, because this operates retrospectively and amounts to an original grant of authority. By virtue of this doctrine a principal is made responsible for the act of an agent to which it was not a party by simply giving its assent. On the other hand, by adopting an agreement made with promoters, a new agreement is created which is governed by all the laws applicable to the formation of the contract.

11. The relation between a corporation and its several members for many purposes is that of a trustee and beneficiary. In law the property and rights of a corporation belong to the corporation itself as an entity and not as the shareholders. They, however, are the real parties in interest. The nature of the trust is declared in the charter. Says Justice Blackburn, as the shareholders are in substance partners in a trading corporation, the management of which is entrusted to the body corporate, a trust is by implication created by the shareholders that the corporation will manage the corporate affairs and apply the corporate funds for the purpose of carrying out the ordinary transactions.

A corporation may ratify an unauthorised trans-

action through its shareholders, either by unanimous action or by a majority, if the transaction was of a character which might have been authorised by a majority in the beginning.

12. The courts will in all cases provide an adequate remedy for the protection of the rights of shareholders. But if a short delay would enable a corporation to act for itself without irreparable injury, a court would perhaps delay action. It will also grant immediate relief when the managers wrongfully refuse to defend suits brought against the corporation. In such a case a delay until a meeting of the stockholders might be fatal by subjecting the corporation to a judgment. To obtain an injunction for the protection of its rights a corporation must show that the injury is threatened for which no other remedy would be adequate. It would seem to follow, therefore, says Morawetz, that whenever a corporation is entitled to an injunction to protect itself, and is not able to supply the remedy, a shareholder may obtain relief for the protection of its interests. Whatever would be an irreparable injury to a corporation would necessarily be a similar injury to its members.

13. The majority at a shareholder's meeting have no power to revoke the powers of an inferior agent because the power to appoint him is delegated exclusively to the board of directors. Nor have the shareholders implied authority to revoke the powers of the directors or managing agents when their term of office is prescribed by the chartered articles of association or by-laws of the company.

14. The shareholders have no authority to dictate what policy the directors shall pursue, or impair the discretion imposed in them. Says Morawetz: If shareholders are dissatisfied with directors whom they have elected, their remedy is to elect other agents at the time and in the manner prescribed in the charter. It would be a violation of the charter contract and a violation and a wrong to every dissenting member to permit any portion of the shareholders to interfere with the discretionary powers which were intrusted to the agents of the corporation alone. Until a mistake on the part of the directors, individual stockholders have no right to appeal to the courts to define the line of policy to be pursued by the company. In applying this rule shareholders cannot interfere with the discretion of the directors in instituting legal proceedings for the benefit of the corporation, nor complain when they have instituted a suit which, in their judgment, should not have been begun. This principle has had many applications and the courts are quite unanimous in sustaining the actions of directors so long as they act within the discretionary authority given them.

15. Cases may arise in which the removal of directors is essential to the company's welfare. Thus, they may be unable or unwilling to perform their duties and even threaten the company with mismanagement and financial ruin. In such cases the courts will grant relief on the request of the shareholders whenever the company is unable to maintain its rights, but it must be remembered that in all cases of mis-

management, fraud, and the like, the wrong perpetrated by the directors, or sought to be, is to the company and not to any individual shareholder. It is needful, therefore, for the company to proceed against the directors for relief. Sometimes the company is so completely in the control of directors that it is quite impossible to proceed against the offenders; especially when all the directors, or nearly all, are conspiring or acting together to defraud or mismanage. In such cases the stockholders must proceed in the name of, and in the behalf of, the company, and when a case of this kind is clearly made out the courts will take cognisance of it and proceed to grant such redress as the occasion requires.

The courts will not remove directors from office, or restrain them from representing the corporation, save in a case of absolute necessity. A court has less hesitation to issue an injunction to restrain them from specific threatened wrongs. When the powers of the directors are revoked by order of the court, a receiver should be appointed until a meeting can be held and new directors elected by the majority.

16. Before shareholders can proceed in behalf of the corporation a demand to act is usually necessary on the proper agents; in other words, a shareholder who asks the court to interfere with the management of a corporation and to grant relief by reason of mismanagement, must show that the directors or managing officers have control and refuse to act on its behalf. But the demand is not necessary when directors are in full control, or cannot be made, for ex-

ample, after their resignation or flight to a more serene country.

17. The suit of a complainant who is personally disqualified from suing cannot proceed, though the other shareholders are entitled to relief, nor can the shareholder who has acquired his share after an unauthorised transaction has taken place complain on the ground that he has suffered wrong, or that his rights have been infringed.

18. The estate of a corporation is to be treated as continuing regardless of its members, each share representing an interest in the entire concern, and the several holders are entitled to equal rights irrespective of the time of acquiring shares. A shareholder, therefore, has an interest in all causes of action belonging to the corporation, whether they arose before or after purchasing. If the courts decline to protect his interest in any case its refusal must be based on some principle of public policy or the plaintiff's personal disqualification.

19. A shareholder is permitted to sue on causes of action which arose before he purchased his shares, assuming, of course, that the corporation ought to sue, but is unable to act. If purchasers were thus disqualified from protecting their interest the transferable value of shares might be impaired. It is not material that the plaintiff knew of the wrongs before purchasing; courts cannot investigate the secret intentions of parties or refuse to protect their satisfactory rights by reason of some ulterior design.

20. A purchaser of shares, however, acquires no

greater rights than those of the prior holder. A shareholder who acquiesces in a violation of the corporate rights and afterwards parts with his shares, extinguishes the cause of action and no future shareholder is entitled to complain. But when there has been no general acquiescence the right to sue passes to the transferee of the shares.

A purchaser of shares has at least as good a right as the prior holder to restrain the performance of an unauthorised contract made on behalf of a corporation. The purchaser is entitled to insist that the corporation's agents shall do their duty after he has become a shareholder. He may insist that they shall not misapply the company's funds and place its franchises in jeopardy by doing any unlawful acts under a contract that was never binding, and if the agents do attempt any violation of their duty he can come into court and insist that his rights have been infringed.

21. A shareholder can in no case recover damages from the directors for the mere non-performance of their obligations to the corporation. This is true, although the individual rights of the shareholders may be infringed. The reason is that the directors are agents of the corporation, and not of the individual shareholders. The corporation alone can compel its agents to do their duty or can recover damages of them for the loss caused by their negligence. The liability, so Chancellor Runyon remarks, is to the corporation in the first instance where the corporation is capable of acting, but if it refuses to do so then a person aggrieved may bring suit. If a cor-

poration be insolvent and its affairs in the hands of a receiver, he may maintain the litigation. If he refuses, or is himself involved, a person aggrieved may sue.[1]

22. The distinction is important, yet not always clear, between the individual and corporate rights of shareholders; and also the different remedies that must be pursued against guilty directors in the two classes of cases. Thus, when the value of shares is impaired by wrongful acts affecting the property or business of a corporation, the shareholders must obtain redress through the corporation, for any relief thus obtained would enure to their benefit. It has therefore been held that shareholders cannot personally recover damages for depreciation in the value of their shares caused by embezzlement or other wrong-doing.

23. On the other hand, when the value of shares is impaired by wrongful acts affecting the shareholders directly, and not merely the value of the corporate estate, they must sue individually. Thus, if the value of particular shares is impaired by mutilating or destroying the certificate of the holder, or by creating uncertainty concerning its validity, the person aggrieved must seek his remedy in an action against the directors.

The same rule applies to damage caused by impairing the value of the shares directly, and not through the corporate property or rights, even though every shareholder should suffer alike. Thus, should the

[1] Chester v. Halliard, 34 N. J., Eq., 342.

market value of shares be impaired by false and slanderous reports, or by the issue of spurious certificates, each owner would be entitled to recover his damages directly. It may be added that the corporation itself might have a separate cause of complaint for injuries to the corporate interests. Thus, if the slanderous reports were injurious to the corporate interest or credit, or the issue of spurious certificates should result in legal liability or other damages, the corporation itself would be entitled to redress.

24. Again, after a dividend has been declared by a corporation, each shareholder has a separate individual right to the amount due on his shares, and this right he may enforce by proper action against the company. On the other hand, should the directors wrongfully refuse to declare a dividend, the only method of proceeding against them would be by company, and not by individual action. No shareholder could sue for any particular portion of the undivided profits. Again, the right of a shareholder to obtain from the agents a certificate showing the number of his shares is an individual right, and likewise the right to have them transferred to another person. In these cases, therefore, should the directors fail to execute his wishes, he could proceed individually for relief.

25. A stockholder is entitled to inspect the books and papers of his company for proper purposes, and should this right be denied him by its officers, he may maintain an action for the wrong he has sustained. He may also enforce his right to compel the corpora-

tion or the officer in charge of the books and papers to permit the inspection.

It is true that there is a limit to the right of inspection. The stockholder must show a good reason for making an examination, and not simply to satisfy some caprice or prank. This rule, says the Supreme Court of Rhode Island, sufficiently protects the stockholder and at the same time prevents an undue interference in conducting the affairs of the company. If a stockholder has no cause for examining the books he is not injured by a refusal of the court to permit him to make it. On the other hand, a company should not be troubled by frivolous and vexatious requests of that kind. A stockholder may be on bad terms with an officer of the corporation, and possibly may have some enmity or wrong feeling in making his examination.

A stockholder is entitled to inspection, though his only object is to ascertain whether the officers of the company have been properly conducting the affairs of the corporation; and to lay the foundation for his petition he need not first show that there has been mismanagement or that there are grounds for suspecting it.

This right of inspection may also be exercised by an agent or attorney or expert accountant for the stockholder, for were this right not given him to act through another more competent, perhaps, than himself, his right of inspection might be worthless.

Sometimes the right of inspection is given by statute, by charter, or by-laws. In Alabama the code

declares that a stockholder of all private corporations has the right of inspection, and examination of the books and records of the corporation at reasonable and proper times. In construing this statute the courts declared that any stockholder has an absolute right of inspection, subject only to the limitation that it shall be exercised at reasonable and proper times and for lawful purposes. He is not required to show any reason or occasion, says the court, rendering an examination opportune or proper or a definite or legitimate purpose. The custodian of the books or papers cannot question or inquire into his motives and purposes.

26. Much discussion has been had of late concerning the rights of minority stockholders, and also what they can do in correcting the misdeeds of directors. Once it was held that after the directors were chosen little could be done in the way of interfering with their action unless they were guilty of positive infringement of the law. Experience has taught the courts that it is needful often to interfere with greater promptitude than through the election of new directors who will attend more faithfully to their duties. Accordingly, it is now held that stockholders may appeal to a court of equity for an examination into the condition of affairs whenever the facts are of such a nature as to show clearly that they are not directing the affairs of the institution properly.

§ 5. Dividends

1. What are dividends.
2. Until declared are part of the assets.
3. Until declared shareholders have no claim to them.
4. Afterward shareholders can recover.
5. If company becomes insolvent dividends belong to shareholders.
6. How dividend must be declared.
7. Dividend must be earned.
8. Cannot be declared out of borrowed money.
9. Interest and surplus.
10. Premiums of an insurance company.
11. Profits of mining corporation.
12. Directors cannot declare dividends out of capital.
13. Reclamation of illegal dividends.
14. Lawfulness of dividends must be considered from time of making it.
15. Reduction and diversion of capital.
16. Declaration of dividend is largely discretionary.
17. Directors must not abuse their discretion.
18. Distribution of dividends.
19. Recent owner cannot be excluded.
20. Legatee is not entitled to profit until dividend is declared.
21. Only stockholders of record are paid.
22. Pledgee's right to dividend.
23. In what paid.
24. Stock dividend.
25. Retention of dividend to pay stockholder's indebtedness.

26. Rights of assignee before declaring a dividend.
27. Who receives dividends declared after a bequest.
28. Does a stock dividend go to the legatee or is it a part of the estate?

1. The dividends of a corporation consist of that portion of its profits which are declared or set apart by the directors for division among the shareholders. They are the net profits, or the surplus profits after deducting the capital, expenses of management and losses that may have been sustained.

2. Until dividends are declared the profits are a part of the assets of the company and do not belong to the stockholders individually. There is no debt in a legal sense due from the corporation to them. It follows that should the company become insolvent before setting apart its profits for the stockholders by declaring a dividend, they must all be applied to satisfy the debts of the concern.

3. Again, until a dividend has been declared the stockholders cannot maintain an action against the corporation to recover their proportion of the profits, but their remedy, if having one at all, is to compel the directors to declare and pay a dividend.

4. After declaring a lawful dividend each stockholder becomes vested with the portion due to him; nor can the board afterward without his consent revoke its action and refuse to pay it.

5. Furthermore, should the company become insolvent, the stockholders would still have a right to the dividend as against the creditors. But the dividend

must have been fully declared to vest the profits completely in them; therefore, if a dividend has been voted but not made public nor reported to the stockholders, and no fund has been set apart for its payment, the vote may be rescinded.

6. The statutes are specific in declaring when dividends may be declared, and provide that they must be paid out of net profits. In no case can they be taken out of the capital. The object of this provision is to prevent its impairment and the corporation's insolvency. The statutes usually impose penalties on directors who violate this provision.

7. The temptation on the part of directors is often great to declare dividends that have not been earned for the purpose of preserving the credit of the company, possibly hoping that it may recover itself; more frequently for the purpose of deceiving outsiders, maintaining the value of the stock and parting with it before the true condition of things is known. This is an ancient game, many times played by directors, notwithstanding the judgments and penalties heaped upon them for their wrong-doing.

8. Dividends cannot be declared out of borrowed money, for this is no profit, although money may be borrowed temporarily for this purpose. This is occasionally done by a corporation that has used its dividends for some other legitimate purpose.

9. Interest also accrued but not paid is not a surplus profit within the meaning of the statute prohibiting a corporation from paying dividends except from surplus profits. This rule, however, may be questioned.

10. The capital stock of an insurance company is not the primary fund for paying losses, but the premiums received for insurance and the interest on the capital stock constitute such a fund. Therefore, unearned premiums on which the risks are still running are not surplus profits out of which dividends can be legally declared without leaving a sufficient surplus to meet probable losses on risks assumed but not yet terminated.

11. The profits of mining corporations subject to distribution are the net proceeds arising from its operation without any deduction for decrease in the value of the mine by reason of taking out ore; and the same principle applies to all corporations organised for the purpose of utilising a wasting property like a mine or a patent. Such a corporation is not regarded as distributing its capital even by dividing all of its net proceeds, though the value of the property is necessarily decreased. Excepting such cases, before profits can be lawfully set apart as a dividend, a proper sum must be set aside to represent the wear and tear of the plant of the corporation for the purpose of creating a fund to renew and improve it.

12. Directors cannot lawfully diminish the capital by way of division among the stockholders. Such action, taken in good faith, does not render them liable to the corporation or to creditors, but when taken for a fraudulent purpose, or through gross negligence, they are personally liable both to the corporation and to creditors.

13. Dividends illegally declared and paid, not based on profits, may be reclaimed either by the corporation or by its assignee for the benefit of creditors themselves. Says Clark: the fact that the directors acted in good faith under a misconception as to what constituted the profits of the company out of which dividends were payable, is immaterial, for the recovery of the corporation may be sustained on the principle which allows the recovery of money paid under a mistake. If the capital stock is wrongfully paid away by the directors it may be pursued by the creditors into the hands of anyone who is not an innocent purchaser or a recipient of the same for a valuable consideration. If such a wrong is threatened a creditor may maintain a bill in equity for an injunction.

14. In deciding whether a dividend was rightfully made or not the transaction must be viewed from the time of making it and not afterward.

15. A corporation cannot reduce its capital by virtue of statutory authority and distribute among the stockholders an amount equal to the difference between the original capital and the new capital without regarding the present value of the property. It must therefore retain property equal in value to the amount of the reduced capital over and above its debts.

16. Whether a dividend shall be declared, and also the amount, are questions lying largely within the discretion of the directors, with which the courts rarely interfere. The stockholders are not entitled as a matter of right to a dividend whenever the annual earn-

ings exceed the liabilities of the company, though there may be a large surplus; the board may, if they think the interests of the corporation require, expend the entire income in making improvements or extending the business of the corporation or perhaps retain it as a surplus fund.

17. Directors are not permitted to abuse their discretion nor to use their power illegally or abusively. They must act in good faith. If the right to a dividend is clear, and there are funds to pay it, a court of equity will compel its declaration. Not infrequently, when new corporations are started, it is understood that dividends are to accumulate until they amount to a large sum. Of course, in doing this, a stockholder obtains the full value of his stock, for, should he desire to sell, it would be worth his proportionate share of this dividend. Sometimes cases happen in which directors have some ulterior purpose in not declaring dividends, and stockholders are obliged to appeal to the courts for redress.

18. Dividends must be distributed among the stockholders at the time of declaring them, regardless of the time during which the profits were earned or the length of time that anyone has been a stockholder. Directors have no right to discriminate against stockholders unless this can be done by virtue of a special contract existing among them. Said the court on one occasion, "the dividends must be general on all the stock so that each stockholder will receive his proportionate share. The directors have no right to declare a dividend on any other principle. They cannot exclude

any portion of the stockholders from an equal participation in the profits of the company."[1]

19. A person who becomes a stockholder immediately before declaring a dividend is entitled to his proportion, nor can the directors exclude him. In one of the cases a person held bonds of a corporation, convertible into stock, who surrendered them and received stock therefor. Shortly afterward a dividend was declared. The owner of the bonds thus converted into stock was entitled to his proportionate share, the same as any other stockholder.

20. As a stockholder is not entitled to any portion of the profits until the declaration of a dividend, a legatee is not entitled to the dividend on any share declared before, but payable after, the death of the testator. The dividend forms part of the body or corpus of the estate and passes to the executor. Therefore, should the owner of stock direct by will the income to be paid to his widow, and die after a dividend has been declared, but before its payment, the executor could properly insist on receiving it as part of the estate.

21. A company usually is protected in paying only to the persons who appear on the books as owners. A company that has notice of a transfer will be liable to the transferee or his assignee for dividends that are subsequently declared, even though the transfer is not registered.

22. The pledgee of stock whose name appears on the books of the corporation, or whose rights are

[1] Lyder v. Alton & Sangamon R., 13 Ill., 516.

known thereto, is entitled to dividends subsequently declared as between himself and the corporation, and it will be liable to him if paid to the pledgor.

It is a common practice in pledging stock to declare in the pledge that the pledgee shall be entitled to the income.

23. If nothing is said by statute concerning the payment of dividends in cash the directors may make them payable in cash or in property, or they may declare a stock dividend. If the dividend is payable in cash the corporation becomes a debtor and must discharge the debt like any other debt which it may owe, in lawful money.

24. A corporation that has the right to increase its capital stock may issue stock as a dividend instead of distributing the profits in the way of money among the stockholders. This is called a stock dividend. Such a dividend, if the stock is issued only to the extent of the surplus profits, is not a violation of the prohibition against reducing or withdrawing the capital stock by distribution among the stockholders.

25. A corporation may retain dividends to apply on any indebtedness due from stockholders. This right of retention does not rest on any lien the corporation may have on the owner's stock to reimburse his indebtedness, but on the right of set off, for the dividend is a simple debt owing to the stockholders.

26. After shares have been assigned and followed by notice of the assignment to the corporation, before declaring a dividend the right thereto passes to the assignee, and the corporation cannot set off a debt

due from the assignor incurred before the assignment.

27. Dividends declared after a grant or bequest takes effect, but earned before, go to the grantee or legatee as income or profits.

In some states a different rule prevails. Thus in Pennsylvania it is maintained that when the stock of a corporation is by the will of the decedent given in trust, the income thereof for the use of the beneficiary for life with the remainder over, the surplus profits accumulated during the testator's life, though not divided until after his death, belong to the corpus of his estate, while the dividends of earnings declared after his death are income and payable to the beneficiary, no matter whether the dividend be in cash, script or stock.

28. In declaring a stock dividend the question has arisen whether the new stock goes to the legatee or receiver of the income, or forms a part of the body of the estate and goes to the remainder man. In Massachusetts cash dividends, however large, are income, and go to the grantee or legatee of the income. Stock dividends, however made, are an increase of the capital, and should be kept for the remainder man. This view prevails in many other states, though not everywhere.

§ 6. Beneficial Associations

1. Nature of beneficial association.
2. Some business associations are called beneficial.
3. Beneficial societies may be voluntary or incorporated.

4. Articles of association are an agreement.
5. Legal status of unincorporated association.
6. Are the members partners.
7. Liability of member for a thing sold to his association on his credit.
8. When liability begins.
9. Association may change its purpose.
10. How members must exercise their right.
11. Member has no proprietary interest in association's property.
12. When voluntary association becomes liable as a corporation.
13. Property of divided society.
14. To what extent are benefit societies charities.
15. Articles of association or charter regulate admission of members.
16. How far courts will go in determining membership.
17. Effect of false representation by member of his qualification.
18. Mode of admission must be observed.
19. Election must be regular.
20. One is not a member until ceremony of initiation is performed, where this exists.
21. Power of majority.
22. How controversies respecting property must be decided.
23. Payment of sick benefits.
24. To what extent benefits may be changed without notice

25. By-laws relating to benefits must be reasonably construed.
26. How far they extend.
27. In applying for them the established mode must be followed.
28. When member can appeal to courts to test his right to benefit.
29. Corporation can expel members.
30. This is incident to every society.
31. Dropping names by revision is not equivalent to expulsion.
32. Causes for expulsion, though not mentioned in constitution and by-laws.
33. Power to expel cannot be delegated to officer or committee.
34. Power to expel does not include power to suspend.
35. Expulsion must be done in accordance with the rules.
36. This power must not be exercised maliciously.
37. Charges must be in writing. Notice.
38. In expelling a society acts in a kind of judicial capacity.
39. When courts will review the proceeding.
40. Charges must be of a serious nature to justify expulsion.
41. Acquitted member cannot be tried again.
42. Expulsion by subordinate lodges of a society.
43. Appeal from action of subordinate lodge does not abate by member's death.
44. Member need not appeal from action when it is void.

45. Restoration of member.
46. Courts seek to preserve property rights of members.
47. Withdrawal from society.
48. Notice of withdrawal bars benefit.
49. Liability of withdrawer for society's indebtedness.
50. Personal liability for promised benefit.
51. Officers are governed by general principles of agency.
52. Association cannot confer judicial power on its officers.
53. Directors need not keep a record of their proceedings.
54. Authority of president.
55. Authority of secretary.
56. Authority of treasurer.
57. Authority of trustees of an association.
58. Right of contributors to a fund given to trustees for distribution.

Besides the corporations already described, are others, especially beneficial and voluntary organizations, that fill too large a place in the affairs of life to pass without notice. Many beneficial associations have a long history, others are quite new; the leading principles that govern all are important to many individuals.

1. Beneficial associations are in the nature of social organisations, and the members are often bound together by secret obligations, mystic signs and fraternal pledges. Very many of these organisations are made up of local lodges.

Their beneficial character varies greatly in different

organisations. Thus, the trades unions have a double nature; the beneficial nature is one side; their authority and purpose to make terms with employers is another side. In some labour organisations this latter feature is by far the most important, leading the members to unite and co-operate for the common end.

2. Some business corporations are also called benefit societies, because they possess this nature. All collect monthly, or at other periods, contributions or assessments, which they agree to pay their sick or disabled members on well-understood conditions.

3. Benefit societies may be purely voluntary associations, or incorporated, either, by a general law, or by a special charter.

4. The articles of association are essentially an agreement between the members, extending or limiting any general obligation that may bind them together. By such action they establish a law for themselves. This fundamental agreement is analogous to the charter of a corporation.

In one of the cases the court declared that individuals who form themselves together into a voluntary association for a common object may be governed by such rules as they think proper to adopt, provided there is nothing in them to conflict with the law of the land. Members are presumed to know the rules, to have assented thereto, and are therefore bound by them.

5. The legal status of unincorporated societies, whether formed for religious, social, benevolent, or for beneficial purposes, is not yet clearly ascertained.

The cases defining their position are sadly lacking in harmony. Abbott says that the language of many authorities proceeds on the idea that every organisation must be a corporation or a partnership. Many of the cases have been decided on this principle; but this is not the only alternative. There may be a joint or common tenancy in property; there may be a mutual or reciprocal agency in transactions for a specific purpose; there may be a well-defined organisation of the owners of such property, or of the actors in such transactions, or both. An organisation may have articles like a partnership, or a constitution and by-laws, yet not be in the eye of the law either a partnership or a corporation.[1]

6. Persons who associate for the purpose of benevolence, charity, or any other lawful object, beside trade or business, are not generally regarded among themselves as partners. But in settling their disputes, in dividing their property, especially in determining their liabilities to their creditors and in winding up their society, legal tribunals generally treat the members as original partners, the association as a partnership, giving effect as far as possible to the articles of association.

The Court of Appeals of New York has considered this question in the case of an unincorporated lodge of a benevolent society, called the "Independent Order of Rechabites." Having been mismanaged, the members sought to dissolve the lodge, wind up its affairs, and distribute its property. The court declared that

[1] Note to 4 Abb., New Cases, 300.

associations of this nature were not usually partnerships. There was no power to compel payment of dues, and the rights of a member ceased after his failure to meet his annual subscription. This particular society certainly was not a partnership. Its purpose was not business, trade or profit, but the protection and benefit of its members.[1]

But in another case of a voluntary association, called the Worth Club, the members were held personally liable to its creditors by the application of common law principles. Said the court: "Where such a body of men join themselves together for social intercourse and pleasure, and assume a name under which they commence to incur liabilities by opening an account, they become jointly liable for any indebtedness thus incurred, and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal."[2]

7. If one or more members order work to be done or supplies furnished, he or they are personally liable unless credit was given to the association.

8. Their liability as members attaches by signing the articles of association, and continues until notice of withdrawal is given.

9. An association cannot change the purpose for which it was organised without the consent of all the members. The executive board cannot convert it into a corporation unless power has been expressly conferred upon them.

[1] 81 N. Y., 514.
[2] Park v. Spaulding, 10 Hun (N. Y.), 128.

10. Members must exercise good faith toward one another, and observe the provisions or their articles of association in regard to property, even though this course may not be for the interest of the concern, and may be against the will of the majority.

11. A member has no proprietory interest in the property, nor right to any proportionate part, either during his continuance or withdrawal from membership. He has merely the use and enjoyment of it and nothing more, for the property itself belongs to the society. After the closing of a society, its members may divide the property among themselves, thus ending its existence.

12. A voluntary association may, by holding itself out as a corporation, be forbidden from denying its corporate capacity to the injury of third persons. It is a familiar rule of partnership law that a person who transacts business with a partnership in the partnership name may hold the members liable as partners, although he did not know the names of all. Their liability is founded on the reason that they are actual partners as between themselves.

13. Sometimes there is a division in a society, and grave questions arise with respect to its property. One rule exists of extensive application. In an association or branch, under the control of a general organisation, there may be a schism or division; two parties may be formed. The faction or party that adheres to the laws and usages of the general organisation constitutes the true association, and is entitled to the enjoyment of the association's property, even if the

members be in a minority, provided they are enough to continue the existence of the association.[1]

In one of the cases the majority of the members of a lodge withdrew from the jurisdiction of the grand lodge and surrendered the charter, while the minority remained true to their allegiance; it was decided that the faithful few were entitled to the charter and property of the original lodge.[2]

Societies of a *quasi* religious character exist to which a member, after joining, surrenders his property and receives support. In one of these cases a member, contrary to rule, left the community and brought an action to recover compensation for his services and also his share of the community property. He did not succeed.

14. To what extent are benefit societies to be regarded charities? This is important with respect to taxation, as charitable associations are taxed either very lightly or relieved altogether from this burden. The Supreme Court of Indiana has decided that a corporation which promises to pay a certain sum as a benefit during a member's illness, in consideration of his payment of dues, is not a purely benevolent organisation; it may be, and doubtless is, benevolent and charitable to a great degree, but is not a benefit organisation in the sense of a distinct benefit without a consideration. Masonic lodges have often been held to be charitable and exempt from taxation. Says the Supreme Court of Pennsylvania: "The true test is to be found in the objects of the institution. Where

[1] Merion Benevolent Ass'n v. Martin, 67 S. W. (Ky.), 38.
[2] Altmann v. Benz, 27 N. J., Eq., 331.

these are to advance the interest of a party, of an association, of a private corporation, of a religious denomination, and the like, however beneficial to the public their growth and success may be, there is a private object to gain; and the institution is not unqualifiedly public." [1]

15. The articles of association, or charter, regulate the admission of members and define their qualifications. One who is wrongfully admitted can be expelled; nor is a society bound by the acts of its officers in admitting a person illegally. Unless a statute declares otherwise, minors may be legal members with the same rights and liabilities as adult members.

A statute required all practising physicians to become members of a medical society. A physician who applied was rejected because of unprofessional conduct contrary to the society's by-laws. A code of medical ethics adopted by the society was declared to be binding on the members alone, and its non-observance previously to membership no legal cause either for exclusion or for expulsion.

16. The courts will not ordinarily determine whether a member possesses the denominational, physical, or other peculiar qualification required by a society for membership. Thus, a court not long since declared that men who associate themselves with others as organised bodies professing certain religious views, or holding themselves out as having certain ethical or social objects, and subject to a common discipline, have

[1] Burd Orphan Asylum case, 90 Pa., 29.

voluntarily submitted to the society of which they are members, and it is for that society to know its own.

17. When the membership of a society is restricted to certain occupations a false representation respecting one's occupation avoids his membership.

18. The mode of admitting new members prescribed by the articles of association, or by the charter, must be observed. If no form of election has been prescribed action on each candidate must be separate. Says Bacon: If a list of several be proposed the election will be void, although the names were read over several times and all assented, for it may be presumed that the members, instead of using their individual judgment on each candidate, compromised their opinion as to some in order to secure the admission of others.

19. The election must be at a regular meeting, or at one properly called. A call, therefore, for a special meeting stating that it is to transact any business that may legally be presented is not sufficient for admitting and electing members.

20. Sometimes a society requires a ceremony of initiation. A person regularly elected a member of such a society is nevertheless not entitled to benefits without a proper initiation. Nor is secrecy of the ceremony material, for this is not against public policy. In one of the cases the court said: "Were the ceremonies open they could not be said to be unreasonable; because they are secret does not make them so. The entire system, its existence and objects, are based upon initiation. We think there can be no membership with-

out it, and no benefit, pecuniary or otherwise, without it." [1]

21. The fundamental principle of every self-governed association is that no one shall be bound except with his own consent. While this is true, the will of the majority is also the will of the whole. This is an essential of all associations.

22. Controversies concerning property rights of religious societies are generally decided by one of three rules.

"(1) Was the property or fund which is in question devoted by the express terms of the gift, grant or sale by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes with no other limitation?

"(2) Is the society which owned it of the strictly independent or congregational form of church government, owing no submission to any organisation outside of the congregation?

"(3) Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?

"In the first class of cases the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust. If the property was acquired in the ordinary

[1] Matkin v. Supreme Lodge, 83 Tex., 301.

way of purchase or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property. In the case of the independent order of congregation this is to be determined by the majority of the society, or by such organisation of the society as by its own rules constitute its government. In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organisation, with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government. In such cases, where the right of property in a civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest tribunal within the organisation to which it has been carried, the civil court will accept the decision as conclusive, and be governed by it in its application to the case before it." [1]

23. Many benefit societies provide for the payment of money to their sick members. A member of a beneficial society is not a creditor, and he can claim only the benefits prescribed in the by-laws existing at the time of his application for relief. A by-law is not an unalterable contract except with his consent. As a Supreme Court has said: "In these societies the rights of the members may be taken away by the alteration of the constitution without notice, unless

[1] Bacon on Benefit Societies and Life Insurance, § 77, p. 128.

the constitution provides otherwise." In a case involving the question the court said the complaining person was bound by the charter. The charter gave no right of action. The constitution and by-laws were liable to change. The changes were made in the way pointed out in the constitution and by-laws.

24. In another case the court held that as both the laws of the state and the by-laws of the society gave the right to repeal or amend its by-laws, a by-law providing that a member in the case of sickness should receive $10 a week could be amended by limiting the allowance to a certain number of weeks thereafter, though the member was sick at the time of passing the amendment.

25. Like other by-laws, those relating to benefits must be reasonably construed. Thus, a by-law provided that any member who became unable to work in consequence of sickness or accident should receive a certain sum per week. A member by trying to resume work, and working two days during the period of his sickness, did not debar himself from receiving benefit during the time, as he was unable to work within the meaning of the by-laws.

26. Provisions for benefits in case of sickness do not extend to bodily injury.

27. A member in applying for benefits must follow the modes prescribed. In a Georgia case the Supreme Court said whoever became a member of a society in controversy, could only avail himself of the rights to be enjoyed in the way and manner provided by its own rules. This principle has been affirmed on many

occasions, and is founded on the highest reason.

28. If by-laws provide for no tribunal to test the right to a benefit a member may have an immediate right of action, and an action lies to enforce the award of the lodge, or the society tribunal. Moreover, a society which agrees in consideration of dues to pay a certain sum as benefits during a member's illness cannot deprive him of his right to resort to the courts in the event of a dispute concerning its payment.

29. A corporation that is duly organised has power to make by-laws and expel members, though the charter be silent on that subject. If the power be expressly granted in general terms, it is conferred to enable the corporation to accomplish the objects of its creation.

30. The power to disfranchise or expel members is incident to every corporation and society, unless formed primarily for the purpose of gain. In a recent case Judge Goode declared: "Corporations organised for gain have no power for expulsion or forfeiture, unless granted by their charter or by general municipal laws." [1]

31. The revision of the membership list by the dropping of names from the roll is equivalent to expulsion of the names of persons whose names are stricken off. This cannot be done save by the vote of a society, at least a majority of the members present voting in the affirmative.

32. There are three causes for expelling a member, even if nothing be said about them in the charter or

[1] Purdy's Case, 18 Amer. & Eng. Corp. Cases, 508.

by-laws of an association. First, for an offence of such an infamous nature as renders him unfit for the society of honest men—perjury, forgery, and the like. Of course, there must be previous conviction by a jury. Second, for an offence against his duty as an incorporator. In that case he may be expelled after trial and conviction by the corporation. Third, for an offence of a mixed nature, which is indictable by the law of the land.

33. The power of expelling a member from a club or society belongs to the general body and cannot be delegated to a committee or officer. The transfer from the body of the society, says a court in a case of this kind, to a small faction of its members is so large and dangerous a power that it cannot be established by inference or presumption.[1]

34. The power to expel does not include the power to suspend. In a Texas case it was held that where the by-laws provided for the expulsion of a member for the non-payment of his assessment, the presiding officer of the lodge could not, without a vote of the members, declare the delinquent suspended.

35. In proceedings to expel the letter of the rule must be observed. This is a grave power to execute, and the law requires the utmost care in executing it. If no notice is required pertaining to proceedings against a member, none need be given. It has often been held that by-laws which provide for expelling a member without notice are void as unreasonable.

[1] When a charter provides for an expulsion and authorises the regulation of the proceedings by by-laws, the board of directors may expel a member in conformity with them.

Says Bacon: "Expulsion, if a property right is involved, must always be on notice, and if no other method of notice is prescribed by the by-laws it must be served personally."

36. Lastly, the power to expel must be exercised bona fide and not capriciously, or arbitrarily, or maliciously.

37. Sometimes a by-law requires the charges against a member to be in writing and signed by the accuser. The notice must specify the time of hearing. By appearing, the member generally waives objection to the notice and to the character or composition of the tribunal. The accused must be permitted to confront his accuser and cross-examine him; the ordinary principles of justice and of right require this to be done.

38. In expelling a member a society acts in a *quasi* judicial character. So far as it proceeds in good faith and by methods prescribed by its laws, its sentence is conclusive like that of any judicial tribunal.

39. A court will, if required, decide whether the grounds for a member's expulsion are well taken. They will interfere in the three following cases: first, when the decision was contrary to natural justice and the member had no opportunity to explain the charge against him; second, when the rules of the club were not observed; third, when its action was malicious and not bona fide.

Action properly taken by an association is final, and the courts will not interfere. Although there may be irregularities in the proceeding, the accused by submit-

ting his case to the tribunal and afterward taking an appeal therefrom acknowledges jurisdiction and cannot afterward sue the association for wrongful expulsion.

40. The charges against a member must be of a serious nature. The following accusations have been held to be insufficient to justify expulsion or suspension: Slander against the society; illegally drawing aid in time of sickness; defrauding the society out of fifty cents; vilifying a member; doing business at less than the established tariff of the society; unprofessional conduct in advertising; disrespectful and contemptuous language to associates; stating that the lodge would not pay and never intended to pay; conviction of actions that may injure the association; ungentlemanly conduct.

It is a sufficient cause for expulsion from a trades union that membership was obtained by feigning a qualification which did not exist, and in remaining after the disqualification was established. Fraud, such as representing himself in good health, when in fact he had an incurable disease, is a ground of expulsion; and generally it may be said that violations of reasonable by-laws are sufficient to justify the infliction of the penalty prescribed, whether it be suspension or expulsion. The courts, looking at the facts in each case, and construing the by-laws to be reasonable when they are calculated to carry out the just objects of the association, will sustain regular proceedings thereunder.[1]

[1] Bacon § 127.

41. A member of a society who is once acquitted cannot be tried again for the same offence.

42. As subordinate lodges of a benefit society are constituent parts of the society, of which the entity and head is an incorporated superior governing body, this fact must be considered in expelling members. There may be an expulsion from membership in a subordinate lodge for violating laws, which generally causes expulsion from the society itself, and there may be a conditional expulsion or suspension. In the first place the lodge may act as an independent body; in the latter as agent of the superior body. Generally, if the assessment is not paid at the fixed time, its non-payment, by the laws of the order, works a suspension, which in fact is an expulsion, although a member may be restored to membership by complying with the laws of the order.

The rights of members of these associations rest in contract and can be taken away only in the manner provided by contract. A member, therefore, cannot be expelled while insane when no notice has been given, nor can an insane member waive anything.

Again, the superior governing body may expel a member, although the by-laws only provide for the expulsion of members of subordinate lodges.

43. An appeal of a member of a subordinate lodge from the vote of expulsion does not abate by the member's death during the pendency of the appeal. If, therefore, on the appeal the judgment of the lodge is reversed, the beneficiary of the member is entitled to receive the benefits agreed to be paid on his death.

44. A member need not appeal from action that is void from want of jurisdiction. It may be likened to a judgment rendered by a court which has no jurisdiction over the subject-matter or the person; it is void. Yet by acquiescence in a wrongful expulsion a member may be considered as waiving his right.

45. As a general rule a member wrongfully expelled from a society may be restored by a mandamus proceeding. The court will examine only so far as to satisfy itself whether the proceedings were in accord with the rules of the society.

Courts are unwilling to sanction a rule that societies doing a life insurance business can expel a member for some infraction of a by-law regulating personal conduct, and thereby causing him to forfeit his insurance. But they will interfere for the purpose of protecting the property rights of members.

46. A distinction therefore is made between cases in which the expulsion is for violating the rules of the society in which no property right is involved, and cases in which expulsion is virtually a forfeiture of property rights. In the latter case a court will satisfy itself in the way of making an inquiry so far as may be needful to determine the question whether there has been a capricious, arbitrary exercise of power.

47. Unless by agreement between the members of a voluntary association that membership shall be absolute, a member may withdraw at any time. Says the court in one of the cases: "The entering into it, the remaining in it, the performance of duties incumbent upon the member by reason of his membership

are purely voluntary," [1] consequently he may withdraw when he pleases without the consent of the association. When doing this, however, he cannot avoid any obligations incurred by him to the association. On the other hand, it cannot after his withdrawal impose any other obligations on him.

48. Notice of withdrawal by a member bars any action for benefits; nor is the association prevented from asserting that a member has voluntarily withdrawn from membership, while denying at the same time his right to take such action.

49. A member of an unincorporated society, who wishes to avoid responsibility for debts by withdrawal, should give notice to the public; but for obligations already incurred he cannot escape liability by withdrawing from membership.

50. It has often been attempted to hold the members of a lodge liable personally for a promised benefit in time of sickness. Says Bacon: "It may be a question of construction in each particular case whether the members are personally liable or not. The better rule seems to be that the members are not held personally liable. In one case the members were held personally liable. In another in which this subject was fully considered the court held that a credit was given to a fund created by the joint contributions of the members who only agreed to pay these stated contributions of dues."

51. The officers of the associations we are here considering are governed by the general principles of

[1] Ellerbe v. Barney, 119 Mo., 632.

agency. The law presumes that each person on becoming a member consents, intends and expects to be represented by needful officers and agents. In the absence of express laws limiting their power, they possess the powers ordinarily possessed by officers and agents, and every member is bound by the rules of the company.

52. An association cannot by its constitution or by-laws confer judicial powers on its officers or committee to adjudge a forfeiture of property rights, or to deprive lodges or members of their property from one set of members and give it to another. This rests on the solid reason that the creation of judicial tribunals is one of the functions of sovereign power; to allow associations to exercise this authority would be contrary to public policy. This is the reason why agreements to refer future controversies to arbitration cannot be enforced; it is a prerogative of the state which cannot be taken away. In a recent case the Supreme Court of Rhode Island remarked: "The finality of such an agreement is objectionable for several reasons. The reason generally given is that it ousts courts of jurisdiction, and so deprives a party of his rights under the law. While he may waive those rights in a given case, when he knows the circumstances and the effect of his act, it is held to be contrary to public policy for one to bar himself in advance from a resort to the courts for some future controversy of which he can have no knowledge at the time of the original agreement." [1]

[1] Pekin v. Société St. Jean Baptiste, 49 St. Rep., 387 (1901).

53. Unless the by-laws require, a board of directors or agents or a committee are not bound to keep a record or minutes of their proceedings. Says Chancellor Zabriskie: "It is not necessary that the minutes of a corporation should be written up by the secretary in his own handwriting, or that they should be approved by the board."

54. The president is the chief executive officer and his authority or power differs greatly in different companies. Says Bacon: The power of the president or other chief officer extends only to matters pertaining to the ordinary business. He may perform acts which by usage or necessity are incident to his office without necessary authority. These powers may be inferred from facts and circumstances. If his acts are within the scope of his authority they are binding on the company.[1]

55. The secretary is the officer to keep its records, books and seal, and to act generally under the direction of the directors. His powers are usually prescribed by the by-laws. If they are not he has the powers ordinarily exercised by the corresponding officer of companies of the same nature. There is no reason why a secretary of an insurance company or benefit society should have powers different from those of a corresponding officer or other organizations. "The secretary is the proper person to have possession of, and prove, the books of the company; and the directors are presumed to have control over him."[2]

56. The treasurer is charged with the custody of

[1] § 167.
[2] Bacon, § 169.

its funds and is responsible for their safekeeping. He must keep its moneys distinct from his own, unless otherwise agreed, and pay out balances due on demand. He has no power to bind the company, only in the usual course of business. He cannot sell or assign without special authority the securities of his company.

57. Lastly, a word may be said concerning the trustees of these associations. Their duties and powers are not yet clearly defined. The generally accepted rule is that a voluntary association has no legal capacity to hold real estate; and if it is conveyed to trustees in trust they are simply owners as tenants in common. Consequently, a conveyance of land to trustees of a non-incorporated religious society and their successors in trust for the use and benefit of the society does not vest the title in the new trustees who may be selected from time to time; it remains in the grantees named in the deed, or in their survivor.

In many states the law regulating the trustees of such associations is statutory, and much of the old common law does not apply. The cases are quite frequent, however, in which this question arises. In respect to general contracts, and acts by trustees, the articles of association define, or ought to define their powers; and in most cases the parties look to them for answer to the question.

58. The contributors to a fund placed in the hands of trustees for a specific purpose have a right to compel repayment to them proportionately of any surplus not needed for the object, and also to require the fund to be applied to the objects for which it was raised.

Furthermore, they have a right to recover a contribution to funds still on hand, raised for an object which has failed.

59. Whenever the members of a benevolent association have agreed as a part of their scheme of organization to submit their domestic grievances to internal tribunals, they cannot, against the protest of the association, maintain a civil action based on a grievance of this nature. Nor can a member resort to the courts for relief against suspension before exhausting the remedies provided by the association itself. Courts, however, will interfere in behalf of suspended members whenever proceedings against them by their association were not conducted in accordance with its rules.[1]

[1] Most Worshipful Grand Lodge v. Lee, 128 Md. 42 (1916).

CHAPTER XXIX

MARRIAGE

§ 1. What Is a Valid Marriage

1. Nature of the marriage contract by common law.
2. There must be an agreement in good faith.
3. Effect of false representations.
4. Whether a fraudulent marriage is void or voidable.
5. What degree of mental capacity is needful.
6. Intoxication.
7. Age.
8. Relationship.
9. Race, colour, religion and social rank.
10. Statutory requirements.
11. Effect of non-observance.
12. Effect of license and solemnisation.
13. Common law marriages are not valid in some states.
14. By the law of what state is their validity determined.
15. Effect of evading the laws.
16. Statute has no effect beyond its jurisdiction except by comity.
17. Damages for breach of marriage contract.

1. The law regards marriage as a contract; it is something more. A contract may be terminated by

mutual consent; the marriage relation cannot be. Unlike a contract, the marriage relation is not necessarily terminated, even though one of them becomes incapable of performing his part. In other ways marriage is irreconcilable with our conceptions of an ordinary contract.

After the contracting parties have entered into the marriage state, an eminent legal authority has said that they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not on their agreement, but on the general law of the state, statutory or common, which defines and prescribes these rights, duties and obligations. They are of law, not of contract. It was by contract that the relation was established; but the relation itself they can neither modify nor change.

2. To constitute a marriage there must be an agreement or mutual assent by the parties. This is essential, and anything showing that there was no agreement is proof that there was no valid marriage. In one of the cases a man and a woman went through the formalities required by law and were pronounced man and wife by a person who was authorised to perform the marriage ceremony. As the parties did this merely as a joke, the marriage was held to be invalid.

3. False representations of rank, fortune, health, etc., do not render a marriage invalid. There may be misstatements of such a serious character as to form just ground for annulling a marriage. When consent is obtained by deceit, so gross that the nature of the marriage is not understood, it may be avoided. Such

cases arise when one of the parties takes advantage of the extreme youth of the other. A marriage under duress or compulsion is lacking the consent required by law. The legal rule is, if either party be in a state of mental incompetency to resist pressure, which is used, there is no legal consent and therefore the marriage is void.

4. A marriage caused by fraud or duress is sometimes said to be void, and sometimes voidable. The better opinion is that if either party is in a state of mental incompetency to resist pressure improperly brought to bear, there is no legal assent.

5. When, by reason of mental defect, a person has not sufficient capacity to give an intelligent consent, he cannot enter into a valid marriage. What mental imperfection will invalidate a marriage is still an open question. The general rule is that the parties must be able to understand marriage and its consequences.

The insanity or other mental weakness must exist at the time of the marriage, a subsequent weakening or overthrow of the mind would not be sufficient. As an Illinois court has recently said, it would be a harsh rule that would permit a married man whose wife later in life becomes insane to put her away on account of her inexpressibly sad misfortune.

Some of the authorities maintain that insanity renders a marriage voidable and not void when the person on regaining his reason, even temporarily, affirms the marriage. And some authorities also maintain that had the other party known he was marrying an insane person he cannot avoid the marriage.

6. Intoxication at the time of one's marriage avoids it for the same reason as insanity, because there is no real consent. But the intoxication must be so excessive as to prevent intelligent action.

7. The age at which a minor can make a marriage contract by the common law is fourteen for males; twelve for females. By statute the age has been fixed at a later date for both sexes, usually twenty-one for males and eighteen for females. Marriages made by minors who are above the age to consent are binding on them and cannot be avoided after they attain their majority. The reason why marriages made above the age of consent yet during minority cannot be avoided on attaining majority is that it is not a contract, but a status involving important rights and interests to property and children which public policy will not permit to be jeopardised at the will of either party.

A minor's promise to marry, though he is over the age of consent, may be avoided by him like any other contract because none of the complications above mentioned arise if it is not executed.

Sometimes the courts hold that a marriage by a minor under the age of consent is void until affirmed. The Supreme Court of Ohio has declared concerning marriages in that state, contracted by male persons under the age of eighteen and female persons under fourteen, that they are invalid unless they live together after arriving at these ages respectively.

The right to disaffirm a marriage on the ground of non-age is not limited to the party who is under the age of consent, if the other party was of suitable age,

but extends to the latter. In this respect marriage differs from a contract. A person under the age of consent is not estopped or prevented from avoiding his marriage on reaching the age of consent by the fact that he fraudulently misrepresented his age.

Unless a statute expressly declares a marriage contracted without the necessary consent of the parents or other requirements to be a nullity, it is regarded as directory and therefore is valid, though the infraction of the law may bring serious consequences to the licensing or officiating authorities.

8. Relationship is another incapacity to marriage. Formerly, the disqualifications of relationship were regulated or determined by the Church; and the rules that have been adopted by the Legislature of every state in the Union follow closely the law enacted in England during the reign of Henry VIII.[1] We have given in a note the relationships that are generally regarded as contrary to law in entering into the marriage contract. This follows closely the law of the Old

[1] Archbishop Parker's table of degrees has been, since 1563, the standard adopted in the English ecclesiastical courts. (Schouler's Domestic Relations, § 16.) The statute prohibition includes legitimate as well as illegitimate children, and half-blood kindred equally with those of the whole blood. Its principles have been recognised in the United States.

A woman may not marry her:	A man may not marry his:
1. Grandfather.	1. Grandmother.
2. Grandmother's husband.	2. Grandfather's wife.
3. Husband's grandfather.	3. Wife's grandmother.
4. Father's brother.	4. Father's sister.
5. Mother's brother.	5. Mother's sister.
6. Father's sister's husband.	6. Father's brother's wife.
7. Mother's sister's husband.	7. Mother's brother's wife.
8. Husband's father's brother.	8. Wife's father's sister.
9. Husband's mother's brother.	9. Wife's mother's sister.
10. Father.	10. Mother.
11. Stepfather.	11. Stepmother.
12. Husband's father.	12. Wife's mother.
13. Son.	13. Daughter.
14. Husband's son.	14. Wife's daughter.

Testament, and it may be added that the penalties for violating them have been increased of late years in many states.

The question causing greater discussion during recent years, both in the English Parliament and in other places, has been the right of a man to marry his former wife's sister. The relationship is one of affinity, as no blood relationship exists between the two. The English law up to a recent date declared this to be a positive impediment. In most of the American states such a marriage has the sanction of law. The courts have declared the marriage to be proper in some states, where no statute on this subject exists.

9. By common law, and also by the law of England, no impediment to marriage exists on account of race, colour, religion or social rank. In many of the United States by statute there are some restrictions between the marriage of white persons with Indians, Negroes, Chinese, and the like. These statutes declare the marriage to be absolutely void, without the necessity of a judicial decree.

10. The contract of marriage by common law legally requires nothing more than the full, free, and mutual consent between the parties who are capable of contracting. Common law marriages are still recognized in twenty-six states, and possibly are valid in six other states in which their exact status has not been clearly settled.[1]

"No formality is necessary in celebrating a marriage unless this is required by statute, but a marriage

[1] See Digest, Am. Marriage Law by Hall & Brooke, p. 14 (1919).

is perfectly valid at common law, whatever the form of celebration and even if all ceremony be dispensed with. All that is necessary is that the parties shall consent to presently live together as husband and wife."

11. "In most if not all of the states statutes have been enacted prescribing certain formalities to be observed in the celebration of marriages, as for instance, statutes prescribing the persons who shall be competent to perform the marriage ceremony, or requiring a license, publication of banns, consent of parents, registration, etc. By the great weight of opinion in this country, however, these statutes should be construed as directory merely, and not mandatory, unless they are expressly made mandatory by their terms; and marriages which are in other respects valid at common law are held to be valid in spite of any informality in their celebration; unless the statute expressly declares that failure to observe the prescribed formality shall render the marriage void. The mere fact that a statute prescribes certain formalities does not render invalid a marriage in which those formalities are not observed." [1]

12. A marriage is not void simply because the formalities prescribed by statute in obtaining the license and solemnising the marriage have not been observed. It is, we believe, the law everywhere that a marriage without a license and solemnisation is valid if the parties consent thereto and afterward live together like other married people. A marriage ceremony, therefore, performed by an official outside his jurisdiction, is not for that reason void. For the same reason a marriage

[1] Tiffany on Domestic Relations, p. 31

is not void because the license was obtained from an improper court or person.

13. In about half the states common law marriages are still valid. In those states they may be made by telephone or by letter. In the other states, in which statutory regulations exist, requiring a license and solemnization before a proper official and a public record of the marriage, the law seeks to overcome marriages irregularly performed in order to legitimize the offspring.

14. The validity of a marriage is governed by the law of the place where it was made. A marriage that is valid in the state where the ceremony was performed will be recognised in every other; thus, a second marriage in Mississippi is binding in Louisiana, although the first marriage was void by the law of Mississippi, the husband having at that time a wife living and from whom, before the second marriage, he had been divorced.

15. State courts will recognise as valid all marriages made in a foreign country, the forms and usages of which have been regarded. A marriage between a Chinaman while in this country and his betrothed in China cannot be regarded as a valid Chinese marriage. A marriage on the ocean must be determined by the law of the state where the parties lived.

The opposite rule, therefore, is equally true that a marriage void in a state or place where it was celebrated is void everywhere.

There are some exceptions to this rule, the most important of which is a marriage by the parties outside the state in which they live for the purpose of

evading their own law. This cannot be done, though the courts are very slow in applying the principle. They seek to maintain marriages whenever this can be done with a due regard to the rights and interests of all concerned. This course or practise is best calculated to protect the welfare of the country in the preservation and happiness of the most important domestic relation in life.

The statute of Massachusetts declares that when residents of that state, for the purpose of evading its marriage laws, go into another state and have the marriage solemnised and afterward return thereto the marriage is void. Such is the law also in many other states, but the rigour of the statute is much lessened by holding that *both* parties must have intended to evade the law, otherwise the courts will not declare the marriage to be void.

In other states a marriage by the guilty party in a divorce suit who is prohibited from remarrying within a specified time, is void, especially if the offence is a felony. Again, when the guilty divorced party is prevented from marrying without leave of the court, which is violated, the subsequent marriage is invalid, although the party thought he had a right to marry.

In some states a guilty defendant is prohibited from marrying during the lifetime of his spouse, and a clause to that effect is usually inserted in the decree. A marriage, therefore, in violation of this prohibition is void. On the other hand, in other states the marriage of such a person within the time prohibited by statute

says so, but is merely voidable. In other words, it is valid until set aside by proper judicial action.

16. The statute of a state prohibiting a guilty party in a divorce suit from marrying has no force beyond the state in which the divorce was granted: it cannot therefore prevent him from lawfully marrying in another state, although by so doing he may be subject to punishment in the former state should he ever come within its jurisdiction. Though the laws of every state concerning marriage and divorce, as well as those relating to crimes and all other matters, of course have no force or power outside the enacting state, effect is often given to them elsewhere, by virtue of the great principle of state comity, and not by virtue of any inherent power in the laws themselves.

17. The damages recoverable for the breach of the marriage contract are such as will place the promisee in as good condition peculiarly as she would have been had the contract been fulfilled. The damages will include compensation for pain, mortification, and wounded feeling, injury to the affections, loss of time, and expenses incurred in preparing for marriage, injury to health, length of time the marriage engagement existed and consequent injury to feelings or reputation due to the breech of the promise. Wealth and social standing of the promisor may be shown to prove the pecuniary benefit and worldly advantage of the marriage to the promisee.

§ 2. The Husband's Guardianship

1. He is his wife's protector.
2. How far he can restrain her.
3. Correction.
4. His domicile becomes hers.
5. Her personal liability for wrongs.
6. Acts that would be wrongs if done to others are not wrongs if done to each other.
7. When husband is responsible for her wrongs.
8. He is not liable for her wrongs relating to her separate property.
9. Husband's right of action for alienating his wife's affections.
10. Wife's right of action for same cause.

1. After marriage questions arise concerning the conduct and property of the respective parties. The law places the wife under the guardianship of her husband, from whom she is entitled to protection from the dangers of the world. He, therefore, has a right to exercise all the protection needful to fulfil the laws and customs of society.

2. How far he can go in the way of exercising restraint over her is still, notwithstanding all the decisions, a somewhat shadowy rule or doctrine. In this country, says an authority, the right has been exercised so far as to allow a husband to restrain his wife from committing a crime, or interfering with the parental exercise of authority over his children. A man, it is said by the Supreme Court of Pennsylvania,

has a right to a reasonable control over his wife's actions.

3. Blackstone declared that a husband had a right to give his wife moderate correction. No such right is recognised to-day. Chastisement is unlawful in any case and will render a husband guilty of assault and battery. Furthermore, if severe or often repeated, by the laws of many states this is a good ground of divorce for cruelty. An eminent jurist of New York (Chancellor Walworth) remarked a long time ago that whatever may be the common law on the subject, the moral sense of this community in our present state of civilisation will not permit the husband to inflict chastisement on his wife even for the grossest outrage.

4. The general rule is that after marriage the husband's domicile becomes that of the wife; in other words, he has the power to establish the family domicile, and it is her duty to follow him; furthermore, her refusal to follow, without sufficient excuse, is in law, desertion.

A promise before marriage not to take her away from her mother and friends is not binding, and does not justify her refusal to go with him to his new home.

Of course, a wife who has already begun a suit for a divorce in her own domicile immediately after marriage may pursue her remedy in the state where she has always lived.

5. A married woman is answerable personally for her crimes as if she were unmarried. But when she commits an offense in her husband's presence she is

presumed to have acted under his coercion, and he must suffer while she escapes. This rule does not apply to the gravest crimes. Should both act in murdering another both would be equally guilty.

The presumption of her guilt does not exist unless she was so near to him as to be under his coercion or control; consequently, if in his absence she does a criminal act, even by his order, her marriage will be no defense. This rule was applied to a woman who was indicted for unlawfully selling intoxicating liquors. It appeared that at the time of making the sale her husband was not in the room with her, but on the premises. In all cases the presumption of coercion is not conclusive, even when the wife acts in the immediate presence of her husband. It may be repudiated by showing that she acted of her own free will in doing the unlawful deed.

Lastly, it may be remarked that, in some states, this rule of a husband's liability for the wife's crime has been changed by statute.

6. It is a legal principle of universal recognition that husband and wife are one person; consequently many of their acts, which if perpetrated on strangers would be crimes are not crimes because the perpetrators are related by the law in such a unique manner. For example, a husband or wife cannot steal from the other, or, to use a legal phrase, cannot commit larceny. On one occasion an attempt was made to sustain an action by a wife against her husband, after a divorce, for an assault committed upon her

during marriage. It was contended by her counsel that marriage or coverture merely denied the right of action and did not destroy it, but the court declared that the error in this proposition was the supposition that the cause of action or right of action ever existed. In such a case there is neither remedy nor right to be redressed.

Nor can a woman either before or after divorce maintain an action against persons who assisted her husband to commit a wrong against her, like assault and battery, during marriage.

In a few states, however, the common law rule has been changed by statute so that a wife can maintain an action against her husband for a wrong. And some statutes, giving a married woman power to acquire and dispose of her property without the control of her husband, have been construed as giving her a right of action for any injury done by her husband to her separate property. But on more than one occasion the courts have construed these statutes differently.

To this rule, that both man and wife are one person, there are some exceptions. If either kills the other the killer is liable for the homicide. In like manner either of them is criminally liable for an assault or battery on the other.

7. By the common law a husband was liable for the torts or wrongs committed by his wife either before or during marriage. This liability was ended by the death of either party, or by a divorce. By the modern law this rule has been greatly changed, and very few

traces remain in the various states of the Union. Now, he is not liable for the wrongs committed by her unless he has participated in them. The statutes in the various states differ greatly in detail, but their general features are similar. For instance, he is not liable for slanderous words spoken by her in his absence. In some states the statutes removing the disability of a married woman to sue and to be sued, and taking from the husband his common law rights to her property and earnings, impliedly removes his common law liability for the wrongs she may commit when he is not present.

In some, but not in all, of the states a husband is still liable for slanderous words spoken by his wife in his absence, and also for an assault and battery or other personal wrong.

8. In the latter states there is a limitation that must be mentioned. His ability does not extend to wrongs committed by his wife in the management and control of her separate property. For example, should she commit a fraud in selling it, or be guilty of any other wrongful act concerning it, he would not be liable.

Another curious result flows from this provision of law. A wife who is capable by statute of managing and controlling her separate estate may in turn be liable for the wrongs of her husband while he is acting as her agent under authority from her. Of course, he is solely liable for the wrongs committed by himself alone in relation to his wife's separate property. If he participates with her in the commission of any wrong both are liable.

9. A husband has a right of action for damages against anyone who alienates the affections of his wife or deprives him of her society and services by enticing her to leave him, or by harbouring her. This right of action is not defeated by showing that he and his wife did not live happily together, but should her comfort and society be of less account to him by reason of their unhappy relations, these facts may be shown to lessen the damages.

In such cases the existence of malice or an improper motive is always a material consideration. Thus, when a woman leaves her husband from fear of bodily harm or other sufficient cause, no action will lie against anyone who from humane motives receives her. To justify a person in doing so the danger or menace to her must be great.

The question of motive arises most frequently in cases wherein a parent induces a daughter to leave her husband, or harbours her after she has left him. The rule is, in the absence of improper motives, the parent is not liable to the husband. Mr. Schouler has thus stated the doctrine: "Honest motives may shield a parent from the exercise of indiscretion while adding nothing to the right of actual control, the intention with which the parties acted being the material point. A husband forfeits his right to sue others for enticement when his own misconduct justified and actually caused the separation, otherwise his remedy is complete against all persons whatsoever who have lent their countenance to any agreement for breaking up his household." "A father's house," says Chancellor

Kent, "is always open to his children, whether they be married or unmarried. It is still to them a refuge from evil and a consolation in distress."

Natural affection establishes and consecrates this asylum. A husband therefore cannot maintain an action against his wife's parents for enticing her away from him or for harbouring her unless he both alleges and proves that they acted from improper motives.

10. In some states a married woman can maintain an action against another for enticing away her husband or alienating his affections. The reasoning is that, as a husband has the right to sue for the loss of the society of his wife, there can be no intelligent reason why she should not possess the right to sue for the loss of the society, companionship, affection and protection of her husband.

§ 3. Rights of Property

1. Formerly he took her property and was responsible for her debts.
2. He was her agent or protector.
3. Enlargement of her rights by legislation.
4. Authority of legislature to change laws relating to property of wife.
5. Her present authority to manage her separate estate.
6. She can make contracts for its improvement.
7. Her right to make contracts with her husband.
8. And others relating to the cultivation of her land.

9. She can maintain an action of ejectment against her husband.
10. He cannot convey land to her and defraud his creditors.
11. She may constitute her husband her attorney or agent:
    a.—His authority under general power of attorney,
    b.—In a power of attorney to convey land it need not be described,
    c.—Authority to do a specific act.
12. Execution of power of attorney.
13. Marriage of woman revokes her prior power of attorney.
14. Conveyance of homestead.
15. Other agency transactions.
16. Community property:
    a.—Essential idea,
    b.—What is such property,
    c.—Realty acquired by purchase,
    d.—Presumption of community property may be overthrown,
    e.—A trust cannot be ingrafted by parol evidence on a deed of community property,
    f.—Increase,
    g.—Gift by husband to wife of community property,
    h.—Reimbursement of husband to wife for community property.
    i.—Effect of removal by either party to another state.

17. Her authority to contract independently of her husband:
    a.—Her authority to become a sole trader,
    b.—Her authority in the different states.
18. Mode of conveying her real estate:
    a.—Her husband must join in the deed,
    b.—How his consent must be evidenced,
    c.—How her consent must be evidenced by separate examination,
    d.—In some states she can execute deeds, etc., as if unmarried,
    e.—Laws in different states.
19. Sale of land belonging to both.
20. In some states both must join in sale of her property.
21. Conveyances in restraint of marriage.
22. Husband's estate by curtesy.
23. Wife's right of dower.
24. When a mechanic's lien can be put on her property.
25. Implied agency of husband.
26. Ante-nuptial settlements:
    a.—Object of making them,
    b.—Each party may thus relinquish his or her interest in the other's estate,
    c.—Rights and obligations cannot be thus changed,
    d.—Marriage is a sufficient consideration for the agreement,
    e.—How creditors are affected,
    f.—Settlement in pursuance of ante-nuptial

agreement, though not made until after marriage.

27. Conveyance between husband and wife.

1. Leaving for the present the legal aspect of wrongs between husband and wife and also between them and other persons, we approach the subject of a husband's right to the property of his wife. Formerly, he was responsible for all her debts contracted before her marriage, as well as afterward; on the other hand, the law kindly relieved her of all her property. In other words, he took everything she had and became responsible for all her bills.

2. In many states the husband was declared to be the agent to care for and manage her property, to bring suit, if need be, for the protection or recovery thereof. In short, the law converted him into an official protector and helper in the preservation and enjoyment of her property. Within a century the greatest changes have been wrought by statute with respect to the ownership and management of her property. These, as we shall now see, have been in the way of rendering her more independent of her husband's control and management. These statutes encountered much opposition, many believing that if a wife were thus given the right to retain and manage her property her independence would lead to unhappiness and quarrels. Truly the love of money has too often burnt out personal affection.

In many states, perhaps in most of them, by statute a married woman may carry on business as a sole

trader with her own property free from the control of her husband and of his creditors, with corresponding rights and liabilities. In some states, however, she has such power only under special circumstances, for example, when her husband has deserted her. Where the disability no longer exists, she may form a co-partnership with other persons than her husband, and also with him wherever the statute permits husband and wife to make contracts. Formerly, the marriage of a woman partner wrought a dissolution of the partnership; this is no longer the law in the states endowing her with authority to become a partner.

3. With advancing years all legislation on this subject has uniformly run in the way of freeing a married woman from her husband's control in owning, using, and managing her property, both real and personal. Whatever may have been the unhappy results flowing from these changes, the good results have been far greater; indeed, they have been so marked everywhere that this legislation has been coursing onward in a broadening and deepening stream until in many states a married woman can manage, own, and dispose of her property almost as effectively as her unmarried sisters.

4. As a legislature has no authority to change, modify or abolish estates of any kind, it cannot divest anyone of his rights acquired by marriage. Every statute therefore of that nature taking away or imparing a vested right is retrospective and opposed to the most general principles of jurisprudence.

A statute relating to future acquisitions of property by married women is constitutional. A state therefore can enact that all property thereafter acquired, or coming to a married woman shall be her separate estate, free from the control of her husband or liability for his debts.

A legislature has power to secure to a deserted wife the right and privileges of a married woman who is a sole trader, and may also confer on her the unqualified right to dispose of her own property, real and personal, unencumbered by her husband's curtesy.

Finally, a legislature has authority to render the property of a married woman liable for family expenses, for debtors have no vested rights to escape from the payment of their debts.

5. We shall now proceed to describe the more important changes in the law relating to the property of married women. A long time ago equity made a wide departure, permitting her to retain the ownership, control, and income of her real estate devised or given to her with the intent and purpose that it should remain her own property. These bequests the courts have never ceased to execute.

A married woman may acquire title to land by adverse possession.

6. To this end she may, without her husband's consent, contract for the repair of her real estate, or for labour and materials to improve and cultivate it. Should a dispute arise concerning an improvement, it must appear that the contract was for the benefit of her separate property.

In some states a married woman may make valid contracts concerning her real and personal estate after abandonment by her husband, or their separation, or after a visitation of insanity incapacitating him for effective action.

7. Once by the common law a married woman could not make any kind of a contract with her husband, but in most states this prohibition has been modified by statute. In Nevada either husband or wife may contract with respect to property as if they were unmarried, subject to the same rules that apply to other persons in similar transactions. In Minnesota this principle applies to every other thing than real estate. In Alabama they make contracts subject to the same rules as apply to other persons with the single limitation that neither can become security for the other. In Pennsylvania a married woman may lend money to her husband and take a judgment or mortgage as security in the name of a trustee. On the other hand, in Massachusetts a married woman may contract as if sole, but husband and wife cannot contract with each other. If she engages in business both are liable for the debts incurred by her.

Where a husband and wife may contract with each other, as if unmarried, a court of equity will inquire whether the contract was fair and just and administer relief should the contract and circumstances require it, but a court will not entertain jurisdiction to enforce voluntary agreements not founded on a favourable consideration, either in favour of the wife against the husband, or in his favour against her. But their con-

tracts which are fair and just, and have been executed, a court of equity will uphold save so far as they conflict with the just rights of creditors.

8. Such a contract may relate to the cultivation of her separate estate by her husband. And in doing so she does not divest herself of the legal title to the products, or run the risk of having them taken by his creditors. They cannot take them simply because the labour of her husband and children entered into them.

Nor can a husband testify against his wife for the purpose of proving a contract between them to pay for his services, if the statute does not permit the husband to disclose any communication made by him to his wife during their married life, except in trials for divorce.

9. A wife may maintain an action of ejectment against her husband to recover the possession of lands belonging to her. The fact that they were at one time homestead lands, or that the husband and children still reside thereon, does not impair her right of recovery. Again, a wife who has separated from her husband, leaving her separate estate in his possession, is entitled to recover it from him as if she were a stranger.

10. A conveyance by a husband to a wife without a valuable consideration is fraudulent as against his creditors. In other words, all transfers of property between a husband and wife whereby creditors are to suffer are invalid. In all cases wherein the rights of creditors or purchasers in good faith are in question the husband is regarded as having notice of the

contracts and debts of his wife, and vice versa. In equity and by statute she can make a gift to, or receive one, from her husband. Such gifts are peculiarly subject to abuse and consequently require the careful scrutiny of the courts.

11. In many states she may also constitute her husband her attorney or agent for many purposes. By common law she could not appoint an attorney even to plead for her; by statute, enacted quite generally, the disability has been removed.

(*a*) Her power of attorney authorising him to sell land does not authorise him to use or dedicate any portion for a street; nor to sell her community interest in his land. But a general power to him to sign her name to all conveyances of real estate in which she has an interest will not be limited to a conveyance of her dower interest; it will empower him to convey all the right and interest in the real estate described, or land afterward acquired, before its revocation.

(*b*) In a power of attorney to convey land it need not be described in detail. Again, when the evident purpose of the power is to enable the attorney to control and convey land obtained after its execution, this construction will be given to the instrument.

(*c*) Authority to perform a specific act given in a power of attorney, containing also general words, is limited to the particular act authorised; in effect therefore the general words have no meaning. Says Justice Field: "Undoubtedly it is a rule that a special power of attorney is to be strictly construed, so as to sanc-

tion only such acts as are clearly within its terms, but it is also a rule of equal potency that the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment."[1] Where the object, therefore, and sole object, of the power is to one particular thing, though it may contain general words referring to other matters, these have but little or no purpose.

12. A power of attorney need not be executed in the presence of the officer who took the acknowledgment, nor need he know that the signature was written by the grantor. If the grantor acknowledges before the officer the due execution of the instrument, he recognises and adopts the signature as his own.

13. The marriage of a woman revokes any power of attorney she may have previously given, and should he afterward execute a deed it would convey no title. But the rule is otherwise if the attorney has an interest of his own in the land. Nor does an unmarried woman who has given a power of attorney to confess judgment on her bond, by marrying, thereby revoke her power.

14. The general rule in conveying a homestead is that it cannot be conveyed unless both husband and wife join in the deed. Nor can either one of them, or both, by a mutual conveyance confer on the other the power to convey the homestead by a sole deed. Furthermore, a power of attorney given by a wife to

[1] Holliday v. Daily, 19 Wall., 610.

her husband to sign deeds and mortgages, etc., but not describing any real estate, or referring in any way to their homestead is too indefinite to authorise him to execute a mortgage on the homestead signed by him for himself and as attorney in fact for her. A mortgage thus executed is void.

In all the states statutes have been enacted laws changing the common law which prevented her from making a valid conveyance, and permitting her to convey her own real estate, and to bar her right of dower in her husband's real estate by uniting with him in conveying it. These statutes, though varying somewhat in the different states, very generally require her to acknowledge the conveyance with defined formalities, apart from her husband. Moreover, there must be a strict compliance with these statutes, or the conveyance will be ineffectual as against her.

15. An understanding between a husband and his wife that she will invest her money in goods to be bought and sold by him as her agent, whether known to the seller or not, is effective between the pair to make the purchase her own and to vest in her the title to the goods.

A husband may, as agent of his wife, contract for erecting any building or improvement on her land and will bind her, especially by her ratification of his conduct during the progress of the work. But when he contracts in his own name for improvements on her land, she cannot be held personally therefor, nor can a lien be maintained thereon.

Again, though a husband may thus act as his wife's

agent, his authority to do so is never implied from the marital relation alone, nor from the mere fact that he occupies, manages and controls her real estate.

16. In some states all property acquired after marriage by either husband or wife is community property except that acquired by gift, bequest, devise or descent.[1]

(*a*) The essential idea is that marriage creates a partnership in property between husband and wife, and that all property resulting from the labour of either or both, and all property vesting in both, except in ways that are mentioned by statute, shall be for their mutual benefit. In many respects it has the incidents of partnership property. Both may have "separate property." The community property is liable for community debts; and in some states also for the husband's debts, whether contracted before or after marriage. How far his control extends over its disposition differs greatly in the states where the system prevails.

(*b*) Whatever is acquired by their joint efforts is regarded their common property. The fact need not be proved that the property in all cases is the product of their joint efforts. The law presumes that whatever is acquired, except by gift, devise or descent, or by the exchange of one kind of property for another, is acquired by their mutual industry.

(*c*) Realty acquired during marriage by purchase, whether the deed be taken in the name of the husband or wife, or in their join names, will be presumed to be

[1] Money deposited in a bank by a wife in her own name which falls after her death into the hands of her administrator, and is claimed by her husband as community property, he can recover.

community property. Of course, the fact of acquiring it by purchase precludes the supposition of a gift, devise or title by descent. The presumption that a deed to a husband is a conveyance of property to the community is under ordinary circumstances much stronger than a deed to the wife. Nevertheless, a deed of bargain and sale to her presumes that the property conveyed was community property, and if she claims it as her own the fact must be shown by clear and satisfactory proof that her separate funds were employed in purchasing it, or that the deed was in fact a deed of gift to her.

(*d*) The presumption that land standing in the wife's name is community property may be overcome by proving that in having the property put in her name he intended to donate it to her. If he purchases land and pays for it out of community property and directs the deed to be made to her as a gift, the title is thereby vested in her. In like manner a conveyance made to a wife in consideration of a debt due to the community from the grantor, with the consent of the husband, and with his intention that the property conveyed shall become hers, will thus operate. The declaration of the husband at the time that his intention in having the deed made in his wife's name was to give her the land is admissible.

Lastly, a conveyance to a wife of land which is known by her husband and receives his sanction or acquiescence, conveys the title to her as completely as by an assertion in a deed. In such a case he is estopped from denying her title.

(*e*) As land conveyed to a husband or wife or both by deed of purchase is presumed to be community property, parol evidence is not admissible to explain or modify the deed in the way of ingrafting on the property after it has passed to innocent persons a trust to their detriment. As between the parties to such a deed, or to purchasers without value or with notice, its legal import may be modified by parol evidence.

(*f*) The increase becomes a part thereof, and is thus stamped with a community character. In Louisiana a business which had formerly belonged to and been conducted by the wife, but after marriage is conducted in the husband's name, becomes the business of the community and may be seized for the husband's debts. In Louisiana the increase of separate property becomes community property. In Texas an increase of separate property is community property, with the exception of the increase of separate lands. The law, indeed, seems to be very sweeping in the way of giving the increase of property to the community. Thus, the increase of cattle, which are the separate property of the wife, is community property. Likewise, the profits of a mercantile business conducted by them during marriage belong to the community, though the funds invested in them are separate property.

(*g*) A husband may give or grant the community property or his separate estate, if free from debts and liabilities, to his wife directly, without the intervention of a trustee, and the property thus donated will become her separate property.

(*h*) A husband may reimburse his wife from the

community property or from his separate property for advances received from her in preference to other creditors he may owe. A gift from him to her will not prevail against a prior unrecorded deed, but it will against a subsequent deed from him to a third person.

(*i*) Persons who are married in one state and remove into another, where the community system is in force, with the intention of residing there, are governed by the law of that state with respect to after-acquired property. A man and woman may by marriage articles stipulate that there shall be no community between them, or what the interest of each one in the community shall be, limited of course by any statute relating to community property.

17. Let us next consider what authority she has for making a contract independently of her husband.

(*a*) In many states a married woman can become a sole trader or merchant and carry on business in her own name. In some of them these rights and privileges have been accorded to her without any formal statutory law. Where such statutes or conditions exist a married woman may contract and deal in all respects like an unmarried one.

Such an extension of her authority does not prevail everywhere. In New Mexico, while she has full power to make contracts, in Illinois is an abridgement refusing her to enter into a partnership or carry on a partnership business without his consent unless he has deserted her, or is a prisoner, or, in short,

is incapable of taking care of her. In North Carolina, until 1911, she could contract as if sole only when acting as free trader with her husband's consent. Now, she can contract "so as to affect her real and personal property" as if unmarried.

(*b*) In some states she can make contracts oral or written, sealed or unsealed, as if she was not married. In Pennsylvania the only noteworthy exception to this sweeping principle is, she cannot become security for the debt of another. She may act as security for her own debt; thus, if she is engaged in business and receives a note from anyone in payment for something, she can indorse it, procure its discount by a bank, and, should the maker fail to pay, be held thereon as an indorser. On the other hand, should a man ask a married woman to indorse his note merely as a friendly act, to raise money thereon for his own use, as she would receive no benefit therefrom except his thanks and perhaps not these, if he failed to pay, she could not be compelled to pay for him. In like manner, in Vermont, she is not liable as indorser, security, or guarantor for her husband, and in Indiana and some other states she is not liable as security for anyone. In New Hampshire she is not liable for any undertaking made by her on her husband's behalf.

In New Jersey a married woman, with her husband's consent, may assign and convey any gift or devise to her the same as if she were unmarried. And in Pennsylvania she may give a bond for a legacy which will bind her estate quite as effectively. In like manner, in Colorado, she can execute any bond or note for

the payment of money; and if the consideration is for the benefit of her estate she is liable thereon.

Without giving in detail more of these changes, in a general way another, who is familiar with them, has said that in most of the states by statute the wife retains title to the property owned or acquired by her before or during marriage; and the right to manage, use or sell it without her husband's consent. With this goes the right to sue and be sued as if she were unmarried. The husband also is generally released from any liability for her debts, or for her wrongs or torts, except those contracted for her support or that of the family, or those within her express or implied agency to act for him.

The common law estates of curtesy and dower are retained in some states. In the greater number they have been materially modified by statutes, or entirely abolished and replaced by a right of succession to each other's property.

One of the roots of the common law still lives. Says Peck, "[1]the duty of the husband to support his wife, originally was more than counter-balanced by his right to claim as his own all her personal property. The income of all her real estate, and the proceeds of her labor, remains in full force, though all those rights of the husband have become obsolete."

The personal rights of married women have passed through fewer changes. Yet even these have felt the transforming hand of the legislator. The change that has caused the greatest controversy relates to the guardianship of the children.

[1] Persons and Domestic Relations, § 116.

In South Carolina a married woman may purchase property and make contracts as if she were unmarried. The same also is the law in Colorado and Oregon. In Arizona the law is not quite so broad. Her contractual capacity does not extend to binding the community property by her contracts.

18. In conveying her separate real estate the laws are more specific and require a more complete presentation.

(*a*) In many of the states she can now convey or mortgage her estate without her husband joining in the deed with her. This is so in states where his interest in her land as tenant by curtesy still exists. In Maine a married woman may acquire real or personal property by descent, gift, or purchase, and may dispose of it without her husband's assent or without his joining with her in a deed. In Minnesota a wife may execute a mortgage on land to secure the purchase money without her husband's joining with her in a deed. In Ohio aliens may hold, possess and enjoy lands either by descent, gift or purchase as fully as any other citizens. In Michigan, following the trend, a married woman may acknowledge a deed in the same manner as if she were unmarried. In Indiana a wife may be bound by a contract or conveyance of real estate as if she were an unmarried woman.

(*b*) His consent must be evidenced by a writing duly acknowledged before a proper magistrate. In some of the states to render this act lawful she must be of full age. In others the minority of the wife does not affect the validity of a deed.

(*c*) In other states the wife must acknowledge the

deed and her consent be proved by a separate examination. Thus, in Rhode Island the law enacts that she shall be examined privily and declare that the instrument is her voluntary act and that she does not wish to retract it. In the larger number of states there is a clause to the effect that she has executed the indenture willingly without compulsion, or threat, or fear of her husband's displeasure, and that she has been privately examined apart from him with respect to the matter. Wherever it is needful for a separate examination to take place the law usually construes the statutory requirements with considerable strictness.

(*d*) In some states the wife may execute and acknowledge all deeds, mortgages of her separate estate, bills of sale or other conveyances without any action by her husband as if she were unmarried.

The books are full of cases in which deeds are found to be defective because this separate examination was not as complete as the law requires.

(*e*) In Michigan when any married woman not residing there joins with her husband in conveying real estate situated therein, the conveyance has the same effect and may be acknowledged or proved as if she were unmarried.

In Iowa every conveyance made by husband and wife is sufficient to pass all the right of either in the property conveyed unless the contrary appears on the face of the conveyance.

Any married woman may release her dower by properly joining in a deed with her husband, whether she is of full age or not. In some states she may re-

nounce her dower by a simple renunciation before an officer without any deed showing that purpose.

While a mortgage of the owner of a homestead made at the time of its purchase to secure the purchase money is valid, the husband and wife, if both are living, must join in the deed to release a homestead interest belonging to either.

In New York a wife may enter into the usual covenants of title concerning real estate and bind her property thereby. She may execute and deliver her power of attorney to convey land as if she were unmarried. And, in other states, a wife may convey her land by power of attorney, describing the same, duly executed and acknowledged, like a deed.

In Kentucky she can convey her estate by power of attorney only when she is a non-resident of that state. She may also take, acquire and hold property by gift, devise, descent or purchase as if she was unmarried. She may make contracts, sue and be sued like a single woman, but cannot sell or mortgage her real estate unless her husband joins in the conveyance.

In Indiana a married woman is bound by her covenants of title in conveying her separate property as if she were unmarried, but in Nebraska a married woman is not bound by any covenant of warranty in a joint deed given by herself and husband.

In Missouri no covenant expressed or implied in such a deed binds a wife or her heirs except so far as may be necessary effectually to convey from her and her heirs all her right and interest which is sought to be conveyed therein.

In New Jersey a married woman may bind herself in such a deed by covenants of title, provided they have no greater effect than to estop her and all persons claiming as heirs, as if she were a single woman.

Lastly, in Maryland, in all deeds of real estate, made to a married woman, she may bind herself and assigns by any covenant running with or relating to the same as if she were unmarried.

19. In land conveyed to a husband and wife both are the possessors during their joint lives of the entirety. Neither of them can sell and bind the other, and the survivor takes the entire estate. Furthermore, an estate thus held by both in common is not abolished by a statute abolishing survivorship among joint tenants. Nor is such a tenancy abolished by any legislation enabling married women to hold property independent of their husbands.

20. The husband and wife in some states must join in all sales, transfers, and conveyances relating to her property.

21. A condition in a will in restraint of marriage without any limitation is void. But conditions annexed to gifts, legacies, and devises in restraint of marriage are not void that are reasonable in themselves, and do not directly operate as an undue restraint on the freedom of marriage. A condition to an estate devised to a son and daughter in common that, should the daughter marry, it should belong to the son was held to be a general restraint of marriage and void.

Various conditions have been upheld on the ground that they were merely to guard against haste or im-

prudence, and these will now be mentioned: First, restraint against persons marrying belonging to specified classes, or against marrying specified persons. Second, a devise or bequest on the condition that should the devisee marry before reaching the age of twenty-one he would forfeit his estate. Third, a condition requiring consent to marry without limitation of age, a provision for a designated beneficiary as long as she remained single, but not after marriage. Consequently, a testator may provide that his unmarried daughter shall hold a devise for and during her natural life unless she shall marry, in which case her life estate shall cease. Such a devise or bequest is merely a limitation of the time of enjoyment and therefore valid.

A condition in a will which constitutes an inducement to married persons to obtain a divorce or to live separate and apart from one another is opposed to public policy and void. On the other hand, a bequest to a husband and wife who are living apart and while divorce proceedings are pending at the time of executing a will, is lawful.

A gift or legacy to a widow while she shall remain unmarried is valid, and the condition must be respected. This rule prevails everywhere. Said a court not long since: The weight of authority is in favour of treating limitations or conditions which are annexed to devises or bequests to the wife of the testator as valid, although they tend to restrain her from marrying again.

22. Much questioning has arisen concerning estates by curtesy, the nature of which has been already

described. By the modern statutes the husband's right to curtesy in the lands of his wife is contingent and does not vest in the husband until her death. Before this event he has no estate by the curtesy, only an expectation. Until then, therefore, the legislature may change, modify or abolish such an estate because it is not vested. In many states the estate by curtesy has been abolished.

23. In like manner the dower right of the wife is a mere expectation, and consequently may be abolished; in other words, it is subject to legislative control. This is not the law everywhere, but it is the law in most of the states.

The wife's measure of dower is governed by the law existing at the time of the marriage, or at the time her husband acquired the land.

As the wife's interest is only an expectant right, the condemnation of land to public use under the right of eminent domain discharges any right of dower therein. Furthermore, a statute providing that a widow shall not be entitled to an interest in lands conveyed by her husband while she was a resident does not contravene the Federal Constitution.

24. A mechanic's lien can be laid on the land of a married woman; and wherever she has the powers and privileges of a single woman she must assume the responsibilities and duties corresponding with her position. Consequently, if she knows that her husband has falsely represented his ownership or interest in her property and has contracted in his own name for erecting a building thereon, though the record would

disclose her title to the property, she is estopped or prevented from defeating a mechanic's lien on her land.

On the other hand, in Texas, no mechanic's lien can be put on a homestead unless the contract for material is signed by the wife. The same rule prevails in Michigan. In California the lien of a mechanic or material man may be created on a homestead by the act of the husband alone without the consent or joint action of his wife.[1]

25. Not infrequently liability for expenditures on her land, and his or her responsibility turns on the question whether at the time of furnishing the materials, or doing the work, her husband acted as agent or contractor. For, if he acted in the latter manner, he alone is liable to those who have done the work or furnished the material. But her participation in the work done, or her directions to the workmen employed, often leads the court to declare that she is estopped from denying that a contract for the work, though made by the husband alone, was not made by her authority nor with her knowledge. By establishing an estoppel against a wife her property is thereby bound.

In many instances the husband's agency is implied from circumstances. Thus, a married woman who has personal knowledge of work done and materials furnished on her separate estate, and to some extent has given personal directions concerning the work, who also has joined in executing a note in settlement of the

[1] By a statute giving the husband the management and control of community property, and providing that it shall be subject to mechanics' liens, he is empowered to contract for the erection of a building thereon which will be subject to them.

claim, is bound thereby, and the mechanic's lien may be enforced against her.

On the other hand, such a lien cannot be established on the theory of her husband's implied authority if she protested at all reasonable times against the execution of the contract. On one occasion, without her consent and against her protest, he erected a dwelling-house on her land. But the material man failed to acquire a lien for his materials, though she occupied the premises with her husband, and knew what her persistent husband was doing.

26. Ante-nuptial settlements are made for the special benefit of the wife, and many questions have grown out of them. They are perhaps less numerous than formerly. They are made before marriage and rest on a valuable consideration—that of marriage.

(*a*) One object of making them is to insure the support of the wife, and also to make a different disposition of property from that which would be made either by will or operation of law. Not infrequently a settlement is made to render the settlement of an estate less difficult. An eminent judge has remarked that marriage settlements are benignly intended to secure to the wife a certain support in any event and to guard her against being overwhelmed by the misfortunes, unkindness or vice of her husband. A court of equity will effect, if possible, the settlor's intention and not permit it to be defeated.

(*b*) Through settlement each party may relinquish his or her distributive share in the other's estate; the wife may bar her dower, the husband his curtesy,

The husband may agree that his wife may retain all her own property to her sole and separate use; he may also add to her possessions.

(*c*) As a rule the rights and obligations arising from the marriage relation cannot be varied by agreement between them. A husband, for example, by merely agreeing to pay his wife a stipulated allowance, cannot always relieve himself of his common law liability to pay for her necessities should the allowance prove insufficient.

(*d*) Marriage is a sufficient consideration to support an ante-nuptial settlement. Says Chancellor Kent: "It is the highest consideration in law."[1] A marriage will support a settlement in favour of husband and wife and their children or the children of a former marriage, but it will not sustain a settlement in favour of entire strangers.

(*e*) Such a settlement is sometimes disadvantageous to creditors, and the ancient statute, known as the Statute of Elizabeth, declares void all conveyances of real property made with the intention of defeating subsequent purchasers. But this statute contains a proviso that the settlement shall not defeat any estate or interest made on a good consideration to any person not having at the time notice of any fraudulent purpose.

As marriage is a valuable consideration, ante-nuptial settlements made in favour of innocent parties are not fraudulent as against creditors and purchasers. If, therefore, the settlor was insolvent or his intention was fraudulent, a settlement in favour of his wife who

[1] Sterry v. Arden, 1 John's Ch. 271.

is innocent, and knowing nothing about his condition, will be upheld. Says Justice Story: "Nothing can be clearer both upon principle and authority than the doctrine, that to make an ante-nuptial contract void as a fraud upon creditors, it is necessary that both parties should concur in or have cognisance of the intended fraud. If the settlor alone intend fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it." [1]

(*f*) A settlement in pursuance of a valid ante-nuptial agreement, though not made until after marriage, is supported by the consideration of marriage as if made previously. It cannot be sustained, however, unless in writing, as required by the statute of frauds, which will now be explained.

By this famous statute no action can be brought to charge any person on any agreement made on consideration of marriage, unless the agreement or some memorandum or note thereto shall be in writing and signed by the party to be charged therewith, or by some other person lawfully authorised to charge him.

This statute applies to an agreement by a man and woman in contemplation of marriage that each shall retain the title to his or her own property and dispose of it as if they were unmarried. The memorandum does not affect the existence of a contract, but simply is evidential. The note or memorandum may have been made at the time of making the contract. It need not be a formal written agreement. Any writing show-

[1] Magniac v. Thompson, 7 Pet., 393.

ing the terms of the agreement, the particulars, signed by the party to be charged, is sufficient. In a recent case a letter from a man to a mother, proposing to marry her daughter, shown to the latter, and stating that the writer would convey certain land to the daughter after their marriage, was a sufficient memorandum of the agreement to convey. A memorandum, therefore, may consist of correspondence, one or more letters forming a series from which a contract can be deduced will satisfy the statute.

27. As the common law conception of marriage is the unity of husband and wife, they cannot make any valid contract with each other. For the same reason they cannot even make a gift. It is needful, therefore, to make valid gifts and transfers of property, to act through the medium of a trustee or third person. There is no law against such action. A husband, for example, who wishes to convey land to his wife, conveys it to a third person who, in turn, conveys the same to her. This method is still practised in many states.

In some states a direct conveyance from husband to wife is authorized by statute. In other states the statutes permitting married women to exercise general contracting powers and to control their property as if unmarried, have been deemed effective to authorize such conveyances.

Equity has a different rule. It recognises and enforces contracts made between husband and wife without the intervention of a trustee. The Supreme Court of Vermont declared many years ago that whenever a

contract would be valid at law, if made through a trustee, it would be sustained in equity though made without him. Therefore equity will uphold a clear gift by a husband to his wife or any conveyance of property wherein creditors are not to be defrauded.

§ 4. Support and Separation

1. May agree to live separately.
2. This may be done without a trustee.
3. Agreement concerning disposition of property.
4. Release of dower in separation agreement.
5. Wife after separation agreement cannot share in husband's estate.
6. Separate agreement does not prevent absolute divorce.
7. Husband's duty to support his wife.
8. Her authority to purchase necessaries when living together.
9. Her authority when living separately.
10. Cannot deprive her by giving notice he will not pay.
11. Her authority when living separately by agreement.
12. Allowance must be sufficient.
13. What are necessaries.
14. Husband's duty to bury his wife.
15. His liability for her debts before marriage.
16. Her liability for her debts if surviving him.
17. Tendency to absolute separation.

18. Causes of separation.
19. Adultery.
20. Cruelty.
21. Mental suffering.
22. Desertion.
23. Drunkenness.
24. Crime.
25. Other causes.
26. Effect of connivance.
27. Collusion.
28. Condonation.
29. Recrimination.
30. Legislative divorces.
31. Public interest in them.

1. Formerly, husband and wife could not make an agreement, even to live apart from each other; this was deemed contrary to public policy. Now, while the law will not permit even a partial dissolution of the marriage contract, yet husband and wife may agree concerning the mode of their separate living and maintenance. A recent jurist has said there is certainly nothing illegal in an agreement between husband and wife to live apart and to divide their property. Such an arrangement is effected through a trustee, and has long had legal sanction.

2. Of late a question has arisen whether such a contract may be made without the intervention of a trustee. To do this is a departure from the common law concerning the rights of the two to contract with each other. The authorities are much divided, yet

the tendency is to sustain direct arrangements made between the parties.[1]

3. In separation deeds between husband and wife the parties may agree on the division or disposition of their property, and either spouse may relinquish his or her interest in the property to the other. Such an agreement, made without undue influence, is generally enforced, especially if it be just and equitable. But a separation agreement, made under moral coercion, is void and not binding on the wife. More broadly any separation agreement made through fear on her part of her husband, or to purchase inmunity from cruel treatment cannot be sustained.

Articles of separation and the division of property do not bar the wife's claim against her husband for temporary alimony in an action for divorce, when she has not sufficient means.

4. A statute requiring a married woman to join with her husband in a deed of conveyance to a third person to release her dower must be regarded, therefore this end cannot be effected in a separation agreement. A provision in a valid separation agreement made through a trust deed excluding a widow from all dower and interest in her husband's estate will have that effect. A wife's release of her claim for dower is a sufficient

[1] Ordinarily a contract of separation between man and wife must be by deed, and be signed by both of them, but an oral agreement, if fully executed on the part of the husband, will be upheld in equity.

In California, Colorado, Minnesota and South Dakota the husband and wife may make a separation contract directly between themselves without the intervention of a trustee. If they agree on a division of the community property, each relinquishing all right to the share allotted and assigned to the other, the contract is binding on both and its effect is to deprive the wife of the right to select a homestead out of the separate estate of her husband either before or after his death.

consideration for a separation agreement, and if she accepts the provision therein made through a trustee in lieu of dower it will, after her husband's death, bar her dower right. The intention to bar her dower, however, must be clear, or it will not have this effect, especially when the agreement is not under seal, nor acknowledged as prescribed by statute.

5. A wife who voluntarily enters into an agreement of separation, cannot, after her husband's death, have it set aside and be restored to her rights in his surrendered estate. This is not the rule everywhere, especially in states recognising community property. Again, a wife's right to share in her husband's estate is not cut off, though she live apart from him for a few years prior to his decease, unless the agreement shows a clear intention to bar her right to a distributive share of his estate.

6. In the United States a court of equity will never decree a separation between a husband and wife in execution of a stipulation of the most formal kind between themselves. It will seek to accomplish the lawful objects of the deed of separation, but not the separation itself.

Nor will an agreement prevent either from maintaining an ordinary action for divorce, whether the case occurred before or after the agreement. But a separation agreement for the purpose of facilitating divorce or the dissolution of the marriage relation is illegal and contrary to public policy.

7. The husband must support his wife. This is the

common law everywhere. So long as he fulfils his obligation she has no power to pledge his credit, even for necessities unless by actual authority. This duty, however, does not continue while she, without just cause, remains away from the home he has provided for her. But, on failing to support her, she is authorised to pledge his credit for them, otherwise she might starve.

8. While living together the presumption exists that he has given her authority to purchase necessities on his credit. A tradesman, therefore, who brings an action against him for such articles furnished to her establishes a prima facie case by showing that she was living with her husband and that the articles were in kind, quality, character, and quantity suitable to their condition in life. On the other hand, he may rebut this presumption by showing that she was forbidden to pledge his credit.

9. While living apart from her husband, there is no presumption that she has authority to pledge his credit even for necessities; the presumption is, in truth, the other way. Under these circumstances a tradesman, in order to hold the husband liable, must show authority in fact, or else bring his case within a rule that will be now mentioned.

10. To prevent her from starving while they are living separately, and for a good cause on her part, she has an absolute right to pledge her husband's credit for necessities. His liability is based on his duty to support his wife. He can, however, escape by showing that credit was given to his wife herself, or that she

had a sufficient separate income, or that he made a sufficient allowance.

The rule applies more strongly in cases of unlawful separation from his wife, without making suitable provision for her; or of his misconduct causing her departure. Of necessity she then becomes an agent to supply her wants on his credit. Nor does her ability to provide for herself affect the rule. But if she leaves him without justifiable cause she forfeits the right to obtain necessities at his expense.

Should she return and be received by her husband the right revives, but only for future necessities. This is also true after her offer to return and his refusal to receive her.

11. This rule does not apply when they are living apart, by mutual agreement, unless no provision has been made for her support. The fact that the person who furnishes her with goods has no knowledge of the allowance is immaterial; in supplying her he acts at his peril.

12. The allowance must be sufficient for the wife's necessities. Whether they are or not is a question of fact to be decided in each case, unless she has agreed to accept a stipulated allowance and not to apply to her husband for more.

13. What are necessities for which she may pledge her husband's credit? They include not only those articles of food and clothing which are required to sustain life and preserve decency, but others suitable to maintain her according to the estate and degree of her husband. Many specific things have been de-

clared to be necessities: wearing apparel, furniture, jewelry, even legal expenses relating to the restoration of conjugal rights and other things.

14. Lastly, the common law imposes on the husband the duty of burying his wife properly, and if he neglects to do so, and this is done by some other, the husband is responsible for the funeral expenses. His liability is not changed by the fact that his wife left property by will to another person, even should he assist in the arrangements and attend the funeral. It has also been said of a husband who is living apart from his wife through her own fault, though he would thereby be relieved from liability for her necessities, he would still be liable for the expense attending her burial.

15. By common law the husband is liable during marriage for the debts contracted by his wife while she was a single woman. But if not collected during her lifetime his liability continues no longer. Even though he may have received a large fortune from her by marriage, he retains the same by common law, unless some statute says to the contrary, free from liability to answer for her ante-nuptial debts. How this rule of the common law has been changed by statute we shall soon learn.

A husband's liability is limited to the debts that were legally binding on his wife, consequently were she a minor at the time of marrying her, he would be only liable for the debts that had been incurred for necessary support. For example, had she been fond of dress, and larger bills were awaiting payment at a dress-

maker's or milliner's, he could not have been held for them.

16. A wife who survives her husband becomes liable for her debts contracted previously, though in the meantime she may, as we have seen, under the operation of the common law, have been kindly relieved of all her means of paying them. This, of course, is not a cheerful situation, either for herself or for her creditors.

17. The law recognises cases in which the happiness of the parties, as well as the policy of the state, demands their separation. Two kinds or modes are in vogue in different states; either absolute separation, or a partial one. The tendency of the times is clearly in favour of an absolute separation, for the reason that experience has shown that a temporary or partial separation is often harmful to both parties.

We have already shown that parties may agree to live separately, though they cannot make any valid agreement to divorce themselves from each other. In other words, the agreement is not a dissolution of the marriage relation. Even to do this was regarded at one time by the law with great disfavour. But one of the great masters of equity of our time has said that a change has come over judicial opinion in this regard; other considerations have arisen and people have begun to think that after all it is better and more beneficial for married people to avoid in many cases the expenses and scandal of suits of divorce by settling their differences equitably by the aid of friends out of

court, although the consequences may be that they would live separately.[1]

18. Besides agreements to live separately as one of the modes of lessening somewhat the unhappy condition of married people, the law for several causes permits an absolute separation. These are defined by statute, and differ in the several states. In some of them only one or two causes exist for an absolute separation; in others several. Generally, it may be said, the Western states have adopted more grounds than the older ones; though some of the Eastern states have perhaps as many or more grounds for legal separation than Indiana, Idaho or any other Western state.

19. Of these causes adultery has long occupied the first place in all the states; and for this cause an absolute divorce may be granted. Next to this cause that of cruelty is the most general. This is not a legal cause in every state, but in many of them. The law is often difficult to apply, for cruelty is a relative term. Some of the statutes say extreme cruelty, others, repeated cruelty; others, cruelty and abusive treatment, and the like. To constitute a ground for divorce it must consist of acts of physical violence. Denial of ordinary comforts and accommodations and want of civil attentions are not enough to constitute a ground for divorce. In every case in which a divorce is sought on this ground the proof must be sufficient to satisfy the statute. Much depends on the temper of the judge. One man may be more tender and humane than another, and

[1] Sir George Jersel, Besant v. Wood, 12 Ch. Div., 605.

therefore regard an act in a different light or way from another.

20. A writer says that the doctrine almost universally accepted is that cruelty to be a ground of divorce must consist of physical cruelty, either direct or consequential without personal violence in conduct which is attended with bodily harm, which renders it impossible or unsafe to discharge the duties of married life. Actual violence is not necessary to constitute cruelty; threats of violence made in earnest and which indicate an intention to do bodily harm are sufficient.

Furthermore, the station in life, the situation of the parties and all the attendant circumstances will be taken into consideration. A single act committed in a sudden passion might not constitute cruelty, when the same act committed as the result of a deliberate act intended to abuse would suffice.

A divorce on the ground of cruelty will not be granted to an applicant who has in any manner been a party to the other's misconduct. As a foundation for a divorce cruelty must be unmerited and unprovoked. Says the court in one of the cases, if her conduct be incompatible with the duty of a wife, if it justly provoked the indignation of her husband, she must reform her own disposition and manner. Although the applicant may have drawn the ill-treatment, of which she complains, on herself, if it is wholly out of proportion to her offenses, intemperate and inexcusably severe, her conduct will not bar her right to relief.

21. By some statutes mental suffering is a cause for divorce. For this is often more serious to the health

and happiness of a person than even physical violence. When suffering is so great that it presses on the mind and undermines the health, though the suffering is caused by words and conduct unaccompanied by any act of physical violence, the result is bodily harm and such conduct constitutes legal cruelty. The tendency of the modern courts is to grant divorces for this cause.

22. Desertion is also another ground for divorce. The law generally prescribes a period of time for this to be a cause for permanent separation. In some states the limit is three years, in others only one. Desertion may occur without going away. A husband who drives his wife away from him by his misconduct, giving her a justifiable cause for leaving him, deserts her as completely as if he had left her.

To satisfy the statute the prescribed period of desertion must be continuous. An offer to return, made by the deserted spouse in good faith at any time before the separation has continued for the statutory period, will bar a divorce, though refused by the deserted party. But such an offer, after the desertion has lasted for the prescribed period, is too late.

The mere ceasing to live together for the time prescribed by statute is not desertion, unless there was an intention to abandon. Separation, for example, by reason of absence, business, or sickness is not desertion within the meaning of the law. As was said on one occasion, mere desertion may result from necessity or accident and be against the will of both parties.[1]

Though an intention to abandon may not exist at

[1] Bennett v. Bennett, 43 Conn., 313.

the time of separating, it may be formed afterward. When it is, and continues, the separation is desertion, but the period of desertion does not begin until the intention is formed. It is sometimes difficult to determine in a case of an unintentional separation to prove the time of the change.

Not only must there be an intention to abandon, but this must be without the consent of the party abandoned. Nothing is better settled than that a predetermined attempt to make a cause for divorce, by agreement between the parties, will utterly fail in its purpose. An agreed desertion falls within this category.

23. Some other causes for divorce may now be briefly mentioned. In nearly all of the states habitual drunkenness is one of them. Of course, this means something more than a single act of drunkenness. By the general rule in nearly all the states the drunkenness must be of a gross and confirmed nature.

24. In many states the conviction of either party of a crime and sentence to state prison is a ground for divorce. In some of them the nature of the sentence is not prescribed, in others the sentence must be imprisonment for a number of years. In some states the statutes cover a conviction and imprisonment in another state.

A woman cannot knowingly marry a felon and set up his conviction afterward as a ground for divorce. The sole exception is marriage in ignorance of the fact. Such cases have happened.

25. A divorce is rarely granted for insanity, though

in some states this is a sufficient cause in cases of incurable insanity; also impotency.

Religious differences may be a cause for divorce. Such cases are happily very rare, growing out of peculiar religious convictions concerning the propriety of life.

The innocent party to a marriage through fraud or duress may have it annulled or set aside.

In like manner a marriage may be annulled that is within prohibited degrees of relationship; or because the party was already married to another or was under the age of consent.

In some states there is a sweeping provision for granting a divorce for any general reason rendering the married life a failure. By this general provision divorces are often granted, the causes lying largely within the discretion of the judge who hears the application.

26. In the way of defenses the connivance of the husband and wife to wrong-doing will prevent favourable action. A court remarked on one occasion that a connivance may be so open, coarse and revolting that there may be no injury to redress.[1]

To constitute connivance there need not be any active, wrongful act. Says Lord Stowell: "I have no difficulty in saying that passive conduct is as much a bar as active conspiracy; when a husband indicates an intention to have his wife transgress, or at least an intention to allow her to do so undisturbed and unprevented, this amounts to connivance."

[1] Morrison v. Morrison, 142 Mass., 361.

27. In no case will a divorce be granted after proof of collusion between the parties, even though there was a valid cause for legal separation. Any agreement between them by which a divorce is sought by imposing on the courts is regarded as collusion. In general, it is collusion for them to act in concert in the conduct of the suit. The husband, however, may make to the wife a reasonable allowance while the suit is pending to save the expense of an application for alimony.

28. An offense may be condoned which will bar a suit for divorce. This applies to every offense that may be committed.

Condonation is always conditional. When the condition is not expressed the law implies that the particular offense shall not be repeated, and that the offender shall treat the other with conjugal kindness. A breach of this condition will revive an original offense as a ground for divorce just as fully as if it had never been condoned.

Condonation may be by words of forgiveness, but an offer to forgive will not operate as a condonation unless accepted by the other party. Condonation may be implied by the conduct of the parties without proof of forgiveness in words.

Condonation necessarily implies knowledge of the offense committed: mere suspicion is not knowledge. Forgiveness, therefore, of an act is not forgiveness of unknown acts; but when the terms of forgiveness are general there should be actual knowledge of every offense.

29. A good defense is any conduct which constitutes a ground for divorce against the complainant. This is known as the doctrine of recrimination. It is founded on the idea that the one who asks for relief must come into court with clean hands. A woman who applies for a divorce on the ground of cruelty will not succeed who has been guilty of extreme cruelty herself. In other words, the party applying for relief must be innocent. In one case a court said a proper administration of justice does not require that courts should occupy their time in giving equitable relief to parties who have no equities. Divorce laws are made to give relief to the innocent, not to the guilty.

The statutes have rarely covered the subject of recrimination except in England. It is a difficult question often to determine when charges of a different character are brought against a complainant, whether they would be regarded as a ground for withholding relief.

30. In some states under peculiar conditions divorces are granted by the legislature; formerly this was a frequent practice; of late years the courts are so efficient in administering divorce laws that application is now rarely made to a legislative body.

31. The public interest is the leading consideration in divorce questions. Matrimony is the restraining power which keeps society decent, to say nothing of the higher blessings which flow from it. Therefore, in most of our states, and commonly in other countries, the party in the wrong as well as the one in

the right, is permitted after a divorce to remarry. In some of our states he is forbidden, yet in some of these a court on special cause shown may release him from the disability.[1]

[1] Bishop on Marriage and Divorce.

CHAPTER XXX

THE PARENTAL RELATION

1. Legitimacy of children.
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5. Widow's duty.
6. Duty of divorced husband.
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9. Father's duty when child has property.
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12. Child as agent for parent.
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18. When child can be heard in making choice.
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21. Reclamation.
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42. Gift of parent to child.
43. Advancement to child.
44. Child is not legally bound to support his parents.
45. Domicile of child.
46. Apprenticeship.
47. Adoption of children.
48. Son has no legal interest in his father's property.

1. Before setting forth the law requiring parents to support and educate their children, a preliminary question must be considered relating to the legitimacy of children. By the common law the children of a void marriage, born afterward, are illegitimate, though the parties acted in good faith. The same thing may be said of voidable marriages. This was rough law indeed, and has been greatly modified by statute. The statutory rule now prevailing probably in every state is that the marriage of two people legitimises in all cases their offspring so that their children may inherit like all others.

2. Children are sometimes adopted, and important questions arise concerning them both to their former parents and to their new ones, especially in inheriting property.

By adoption the natural parents are divested of all

personal rights and are relieved also of all legal duties toward their children. They lose, and the adopted parents acquire, the right to the adopted child's custody and control, to his service and earnings; on the other hand, they are relieved of the duties of maintaining and educating him.

In some states the adopted child becomes the heir of the adopted parent, like a natural child, except that he cannot take from the adopted parent's kindred either lineal or collateral. He can also inherit from his natural parent and kindred as though he had not been adopted, thus inheriting from both his natural, as well as his adopted, parents.

Turning to the other side, suppose an adopted child has property, and dies, who can inherit? If the property comes from an adopted mother, on the child's death it will go to his adopted father, thereby excluding his natural parents; if the property has not come from one of them, the question is still open whether the other will take it on the death of the adopted child.

In Missouri the court has declared that though the legal relation of parent and child exists between adopted parent and child, yet as the statute vests the right of inheritance in the child only, the adopted parent cannot inherit from the adopted child. That court has even declared that the property of a child, acquired from an adopted parent, by the statute goes on his death to his natural parents. This ruling has been often criticised.

In Massachusetts the legal status of an adopted parent and child has been carried far enough to hold

that an adopted child will take like a natural child by virtue of a residuary clause in an adopted father's will, giving all property not otherwise devised to his child or children.

3. By the ancient common law there is no legal obligation on the part of a father to maintain his child. This is also the English law. Morals are one thing and sometimes the law is another; this is an illustration of the wide gap between the two.

4. The American rule is quite different. A legal writer asserts that the parent is legally as well as morally bound to support his children who are incapable to care for themselves, if able to do so; if neglectful of his duty, which is performed, even against his wish or direction, by another, the parent is liable therefor. The law fastens the liability on him, though no contract exists.

A husband and wife cannot, for the maintenance of their child, make a contract which a court must enforce; nor can a husband relieve himself of his primary liability to maintain his child by contract. It is not illegal for parents who have separated to contract for the maintenance of their child, but a court will not enforce it unless it will ensure proper care and maintenance.

If a child leaves his parents' house voluntarily to seek his fortune, or to avoid discipline, he carries no credit, and his parent is under no obligation to pay for his support.

5. There is a conflict of authority over the question of a widowed mother's duty to maintain her

minor children. In some states she is held liable; in others, not. Should she marry again the stepfather is under no obligation to support her children by her first husband.

6. Should a wife be divorced from her husband his duty to maintain the children would not pass to her, because they would not pass by the decree. But if the care and custody of the children were awarded to her, then the obligation to support them would also pass, unless the courts should decree otherwise.

7. The mother's obligation is not inclusive of her husband's liability. Thus, an Ohio court has said that his duty to support his children is not to be evaded by so conducting himself as to render it necessary to dissolve the bonds of matrimony and to give the mother the custody and care of the infant offspring. Alimony, therefore, in its proper significance is not maintenance to the children, but to the wife, and the fact that there has been a judgment of divorce, alimony, and custody of minor children to the wife will not of itself operate as a bar to a subsequent claim against the husband for the maintenance of the children.

8. A father's obligation to maintain his child continues until he is able to provide for himself. In no case does it extend further than to necessary support. The legal obligation ceases, except by statutory law, as soon as the child reaches his majority, though ever so helpless and his father ever so wealthy.

9. A child that has property of his own, while his

father's means are insufficient, may be maintained and educated from his own income. In some cases even the principal of the fund belonging to the child may be used in this manner. As a general rule, a father who possesses ample means to support and educate his child must do so, nor will any allowance be made from his child's property for this purpose, unless his fortune is much greater.

What allowance, if any, shall be made to a father for his child's maintenance is a broad question of equity. The circumstances of each case, including the respective estates of father and child, must be considered, and the decision should be just and reasonable with due regard to the general rule of parental duty.

10. The duty of the parent to protect his child is recognised by the common law. A parent may justify an assault and battery, or even a homicide in defending his child.

11. The duty of a parent to educate his children suitably to their station in life is a moral, not a legal duty by the common law. But the state has enacted statutes on this subject too imperative for anyone to disregard; and the strong tendency is to go further and further in the way of requiring children to be educated at private or public expense.

12. A child can be authorised to act for his parent. As an agent he can bind his parent by a contract for necessaries or for other things in accordance with the ordinary principles of the law of agency. Thus, a person may act as an agent who, by reason of his

minority or other incapacity, is unable to act for himself. And his right to thus act in purchasing necessaries may be established from slight evidence. Thus, a father who permits his minor child to purchase goods on his account, either for himself or for his father, and pays for them without objection, creates the presumption that the minor had full authority to make such purchases.

Consequently, although credit may be given to a child and not to his parent the latter becomes liable, on the theory that his child has contracted, not for himself, but as an agent for his parent, and therefore has pledged his parent's, and not his own credit.

13. A parent possesses authority to correct his child. Says Chancellor Kent: "The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority, and, in support of that authority, a right to the exercise of such discipline as may be requisite to the discharge of the sacred trust."[1] A parent, therefore, has a right to correct and punish his child in a reasonable manner. So long as he keeps within this rule he is not answerable to the law. The same rule, it may be remarked, applies to a school teacher.

A parent cannot inflict excessive punishment, nor wantonly or without cause. If he does he is answerable criminally for assault and battery, murder, or manslaughter, depending on the offense he has committed. The rule is difficult to define, for parents

[1] 2 Comm., 203.

must be allowed to exercise some discretion. A jury cannot exercise this for them.[1]

14. A mother possesses the same right as her husband to the control of the children who have passed to her by reason of his death or separation. An authority has remarked that there seems no reason to doubt but that even during the father's lifetime, even against his objections, a mother has a legal right to correct her children. But this statement is open to criticism.

15. By common law a father is entitled to the custody of his minor child. This is an absolute right unless he is legally unfitted to have the custody. After the father's death the right passes to the mother.

16. The father's right cannot be taken away, even if the prospects of the child may thereby be greatly improved. The Supreme Court of Arkansas has remarked that "it is one of the cardinal principles of nature and the law that, as against strangers, a father, however poor and humble, if able to support his child in his own style of life and of good moral character, cannot without the most shocking injustice be deprived of the child by anyone whatever, however

[1] "The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, and to the good order of society, that no moralist or lawgiver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretenses. But at the same time that the law has created and preserved this right, in its regard for the safety of the child, it has prescribed bounds beyond which it shall not be carried. In chastising a child the parent must be careful that he does not exceed the bounds of moderation, and inflict cruel and merciless punishment. If he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess which constitutes the offense; and what this excess shall be is not a conclusion of law, but a question of fact, for the determination of the jury."—Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec., 322.

brilliant the advantage he may offer. It is not enough to consider the interest of the child alone."[1]

The best interests of the child are to be considered with due regard to the father's rights. If he is a drunkard, or a criminal, or shiftless, or otherwise unfitted, the interests of his child should outweigh the father's right of custody. Again, if the father deserts his wife and child, leaving him to the care of others, his welfare may outweigh his father's right when he subsequently seeks the aid of the court to regain the custody which he has thus lost. Even when he relinquishes the custody of his child to another at the latter's request, and for what he supposes to be for the child's interest, he may be regarded in a sense as having neglected his parental duty. Consequently his right to the child's custody when he seeks to regain it, particularly after a lapse of years, must yield to the child's interest.

17. In ascertaining what is best for the welfare and happiness of a child, a court will consider the ties of nature and of association, also the character and feelings of the parties contending for the child's custody; the child's age, health, sex and surroundings; and finally the education, development and pecuniary prospects of the child.

18. A child that has reached the age of discretion is often allowed to make his own choice and his wishes will always be taken into consideration. The rights of parents and guardians should also be respected.

19. In granting a divorce, either to the husband or

[1] Verser v. Ford, 37 Ark., 27.

wife, the complainant is not always entitled to the custody of the infant child. As in other cases, the best interests of the child will determine this question. The custody of a young child or one in delicate health needing a mother's care will ordinarily be awarded to her, at least temporarily, even though her husband be without fault. If one of the parties is unfitted and the other fit, the question of the child's custody is easily settled by applying the test of parental fitness.

The decree does not permanently settle the matter; a change in the circumstances of the parties to the divorce may authorise the court to order a change of the custody of the children.

20. An agreement between mother and father to relinquish his right to the custody of a child is declared to be against public policy and void. Says a legal tribunal: "The care and custody of minor children is a personal trust in the father, and he has no general power to dispose of them to another."[1]

While this is the general rule, yet the courts do not entirely ignore such an agreement. While the law does not countenance it, the interests of the child form the controlling consideration. The courts have frequently refused to restore the custody of a child to a parent, especially after a separation for years, and the child has transferred his interests and affections to his adopted home. To do this would be a serious wrench to the child's affections and the law will not compel him to return. Nevertheless, the change of

[1] State v. Baldwin, 5 N. J., Eq., 454.

custody is not so complete as to prevent the courts from further action when this is demanded by the child's welfare.

21. The agreement must be clear and definite. And the courts have held that an oral agreement between a father and a third person, giving up the custody of his child during infancy, does not prevent a reclamation.

22. So long as a minor child is supported by his parents and has not been emancipated, the father is entitled to his services and earnings. After his death the mother is entitled to them to the same extent as the father would be, if living.

The same rule applies to a wife whose husband has deserted her, or is in prison, and who is obliged to maintain her children.

23. As a parent is thus entitled to the earnings of his children, he may maintain an action for a child's wages against one who has employed him; and the action may be brought in the parent's name. The right is personal to the parent and cannot be assigned; but the rule does not prevail everywhere; in some states a parent may assign his child's services for a consideration inuring to the father.

24. As long as a child is not emancipated he cannot make any contract for service with another that will bind the father; nor give a valid discharge for his wages. One, therefore, who pays a minor for any service he may have rendered does so at his peril; for, should the father sue him for the amount, payment to the son would be no defence. The same prin-

ciple applies to an apprentice who is employed without his master's consent.

A father whose child is employed without his consent may ratify his child's contract and recover thereon, or repudiate it and recover for the value of the service thus rendered.

25. As the earnings of an unemancipated child belong to his father, they may be reached by his creditors and subjected to the payment of his debts, just like any other property. Again, if such earnings have been used to purchase other property. this can be taken by the father's creditors in like manner.

26. A child may be released from parental control and entitled to his earnings by his parents' consent. By thus emancipating him the parents' rights, duties and liabilities also cease.

27. While emancipation continues the parents' authority over his child is gone, and he is entitled to his earnings free from any claims made by his parents or his parents' creditors; on the contrary, he is obliged to care for himself. Furthermore, on his death his earnings pass to his administrator.

28. Emancipation may be effected by operation of law, even against a parent's will. It has this effect by the valid marriage of the child. It may be effected through the wrongful conduct of the parent indicating a renunciation of the parental relation—abandonment and neglect to support his child. In one of the cases the court remarked that, although the general principle is clear and unquestioned, a father is entitled to the services of his minor child and all that

he earns by his labour, yet it seems to be equally clear that as the right of the father to the services of the child is founded on his duty to support and maintain him, if he should fail, neglect or refuse to observe and perform this duty, his right to the services of his child ceases to exist, and this we hold to be the law.

29. Emancipation may be implied, even though the child remains at home, from his father's promise to pay him for his services during minority. On such a promise he can maintain an action against his father to recover them. As the presumption is against the contract, the child must prove its existence, in order to recover against his father.

Emancipation also may be implied from the conduct of the parties. Its existence or non-existence is to be determined by all the facts in each particular case.

30. A parent who leads others to believe that he has emancipated his child, and who acts on this belief, will be estopped to deny emancipation to their prejudice, whatever the fact may be. Thus, if a child makes a contract on his own account to serve another, which is known by the father, who makes no objection thereto, the other party may safely pay the child his earnings. The payment will bar any claim to them by his father.

31. A parent's gift to his child of his services does not require any consideration to endow it with vitality. As there is no consideration, the gift may be revoked at any time before the child has acted thereon. In other words, the same principle applies to this as to

any other gift—it is not binding on the donor until acceptance.

32. The relinquishment of this right by the father for a valuable consideration cannot be revoked. Says the Supreme Court of Massachusetts: As a minor may hold his title and right to earnings by a contract with his father under seal or for a valuable consideration there is no reason for holding that the father may revoke this contract at his pleasure more than any other contract. On principle he should be as fully bound as by the conveyance of land or other property to his child.[1]

33. An emancipated child is entitled to his future earnings and services against his father's creditors, even though he be insolvent. The courts have gone so far as to declare that even though the intention be to prevent creditors from enforcing their claims against such earnings or the property purchased with them, this may be done. A creditor cannot, so a tribunal has declared, make his debtor work in order to pay his debt, nor can a creditor force him to make his children work or sell a valuable interest which a father has in the services of the children. We may add the words of the Supreme Court of Pennsylvania: "A father is not bound to work his son or daughter as he would work a horse or slave for the benefit of his creditors."[2] But when an arrangement is a fraud to defeat creditors then a court will not hesitate to set it aside.

34. A child who is abandoned by his father and

[1] Abbott v. Converse, 4 Allen, 530.
[2] McCloskey v. Cyphert, 27 Pa., 220.

left to provide for himself is entitled to his earnings as a means of support, and his father has no claim on them.

35. Should a child be assaulted and injured the law regards this as something more than an injury.

(*a*) The parent is deprived of his services and consequently may sue to recover them. If the child is so young that he cannot perform any service, and is cured before reaching a serving age, there can be no recovery for a mere loss of service, for the child can render none. This is the English doctrine. In many states the principle is held that there may be a recovery for prospective loss of service however young or incapable of service the child may be at the time of bringing the action to recover them. The loss of service or expenses must be a proximate result of the wrongful conduct of the person sued.

(*b*) A parent may recover the extra expense occasioned by the wrongful conduct of another; for example, for the medical or other expense incurred in curing him. Whether the parent can recover for such expenses independently of his loss of services is a question still puzzling the judges.

(*c*) To recover for the loss of service this must be shown; for a child that has been wholly emancipated there can be no loss of service, therefore none can be recovered. On the other hand, the father of an unemancipated child would have right to recover for the loss of services thus sustained.

(*d*) Should the child be temporarily absent from

home at the time of the wrongful injury, this will not defeat the recovery.

36. For the wrong done to a child there are two causes of action—one by the parent and another by the child. The law is somewhat technical and declares that a child cannot sue for a damage to a parent, nor a parent for a damage to a child. Thus, a father can maintain an action for wrongfully excluding his child from school, because he alone is injured. On the other hand, a child that is injured by an assault and battery alone can sue for the personal injury, for the damage is to him and not to his parent. Such is the general law, yet, as we shall soon see, it is somewhat contradictory.

37. A parent is under no liability for the torts or wrongs of his child not committed with his knowledge nor by his authority, expressed or implied. But a parent who authorises his child to act as his agent or servant will be liable for the wrongs committed by him in the course of his employment. As a court in a recent case has said, a father is never liable for the wrongful acts of his minor son unless the acts are committed with the father's consent, or in connection with the father's business.

A father is not liable for the unauthorised assault by his son, though he may have known that he was vicious; but if he knows that he is committing a wrong and makes no effort to restrain him, the law regards him as consenting and authorising its commission.

A parent who aids or abets his son's acts may become criminally liable for them, just as he would were

he aiding and abetting any other criminal, but he does not incur any criminal liability for his child's act to which he is in no way a party.

38. By the common law a parent could maintain an action against a person for furnishing his child with intoxicating liquors. In many states this right of action is given by statute, which is founded on the supposition that a father is deprived of his service and is perhaps compelled to expend money and care for the recovery of his child.

39. The right of a parent to the custody and service of his child gives him a right of action against anyone who abducts or designedly entices his child away from him, or who harbours him, knowing that he has wrongfully left home. The remedy may be an action to recover for the service of the child, or an action of trespass, as it is called, for the wrong and subsequent loss of the child's service. The harbourer's intention is immaterial. Should a runaway child be employed in good faith, without knowing that he has run away from home, his employment would not be a legal wrong.

In thus suing the recovery may include the expenses for regaining the custody of the child. The gist of an action is the loss of the child's service.

40. Whatever property a child may acquire, except as a compensation for his services, belongs to him absolutely, and the parent has no claim thereon. The court long ago remarked that a parent has no title to his child's property, nor is the capacity or right of the latter to take property or receive money by

grant, gift, or other wise, except as a compensation for services, in any degree qualified or limited during minority.

41. From this it follows that anyone who pays money belonging to a child to his parent does so at his own risk, and will not be protected by the parent's discharge. Whatever a parent gives to his child in the way of support and maintenance and for purposes of education, clothing, school books, etc., may be reclaimed; whatever a parent gives, not in the way of support and maintenance but with the intention of making an out-and-out gift, is the child's property.

42. This leads to the rule that a gift by a parent to his child, accompanied by delivery, is just as valid as any gift made by others, or as a gift between strangers; the relationship of parent and child imposes no disability upon them to contract with, or give to each other.

As relationship between parent and child easily permits the exercise of undue influence by the parent, consequently a gift or conveyance by a child to his parent will often be presumed to be the result of undue influence on the parent's part, and may be avoided by the child after attaining majority. Even the presumption of undue influence from parental relations does not cease on the child's attaining his majority, but continues until a complete emancipation of the child's judgment from the parent's control.

In one case a daughter soon after reaching her majority, made a gift to her father of some land,

A court afterward examined the transaction with the most jealous scrutiny and suspicion.

43. A gift made by a parent to his child in anticipation of his share of the parental estate is known as an advancement, and is duly regarded in the distribution whenever the parent dies intestate. But not every gift from a parent to a child will be thus considered. Payments made for the ordinary expenses of maintenance and education are not advancements, nor gifts of money for current expenses or other similar presents; but substantial payments of money, or the delivery of other property, or real or personal, of considerable value are often presumed at least to be advancements. Says the court in one of the cases, the presumption is that a father who gives a large sum in one payment to a son intended to start him in life or make a provision for him.

44. A child in many states is under no legal obligation to support his parents, even though they are destitute and infirm; in others, by statute such an obligation exists. His moral obligation no one will dispute. While they are entitled to his wages during minority, on the other hand, as he bears to them no legal duty of maintenance, no promise on his part to pay even for necessities furnished to them will be implied. Consequently, should they be furnished, no action therefore against their child can be sustained.

45. The domicile of a legitimate child is that of his father. Consequently if the parent changes his domicile that of his child changes also. A mother's domicile acquired after her husband's death deter-

mines that of the child, but the child's domicile will not follow the mother's in case of her remarriage, remaining unchanged by that event.

46. Apprentices are persons, generally minors, who are bound to a master for a term of years to learn some art, or trade, and to serve his master and be maintained by him during his apprenticeship. In most cases an apprentice is bound by a sealed writing or deed, but this is not a positive requirement unless so declared by statute. If the agreement is broken by either party, the other may maintain an action against him for the injury. His master has a right to the services of his apprentice, and to all the wages he may earn through his employment by others.[1]

Not only can a parent bind his child, but the overseers of the poor can apprentice a child who has no property. Of course an adult can bind himself. As the father of an illegitimate child has no control over him, he cannot bind him as an apprentice. Again, a mother, if the father be living, cannot bind out her child as an apprentice.

The statutes perhaps in every state prescribe the mode of binding an apprentice. The officers should inquire into the fitness of the master to have charge of the education of the apprentice, and when he has been bound to an improper person the courts will grant relief. An apprentice cannot be assigned to another master. In the contract of apprenticeship, whether made by the minor himself, or by his parent or guardian or by persons clothed with public authority,

[1] Tiffany on Domestic Relations, p. 476. 2nd Ed. See also Chap. XV., § 1, of this work.

the law presumes that a special regard was had to the personal character and capacity of the master. The action of a master who sent his apprentice abroad on a long whaling voyage from which the master was to receive his earnings was condemned.[1]

47. The adoption of children is regulated largely by statute. In some states only a minor can be adopted, in others an adult may be, also a waif. The proceedings are usually statutory, and when these exist, no other way can be used. A broad or sensible construction is given to them.

A decree of adoption, rendered by a court, may be revoked on proper proceedings by the same tribunal.

Unless the statute requires notice, none to the child is necessary in a proceeding for its adoption. If the child has a guardian, assent by him will be sufficient.

Under a statute of another state providing that an adopted child shall take the name of the adopting parents and have all the rights of a child and heir, a decree of adoption will at once establish the relation of parent and child and invest him with the capacity of an heir-at-law. The legal rights of the child thus established will be recognised and upheld in every other state, unless opposed to its laws and policy.[2]

Under the Civil Code of California the wife has precisely the same right to adopt a child as the husband, and both may unite in the application for the adoption as the child of both.[3]

48. A son, standing merely in that relation, has no

[1] Randall v. Rotch, 12 Pick., 107.
[2] Van Matre v. Sankey, 148 Ill., 536.
[3] In matter of Williams, 102 Cal., 70.

legal interest in his father's property, and therefore cannot maintain an action to have a transfer, made by his father when capable of acting, set aside because of a fraud practiced on him by the purchaser. Such an action lies only by the father himself against the defrauder, or, if dead, by his personal representative, or by those to whom the father owed some debt or duty which would be avoided or violated if the transfer made by him were permitted to stand.

CHAPTER XXXI

DISABILITIES AND LIABILITIES OF MINORS

1. Attainment of majority.
2. Cannot appoint an agent.
3. Liability for wrongs due to accident.
4. Age of criminal irresponsibility.
5. Rules of law in actions of minors in which negligence is the defense.
6. Liability of minors.
7. Wrongs growing out of breach of contract.
8. Fraud.
9. Minors as office holders.

1. It is proposed in this chapter to treat more fully of the rights, disabilities, and liabilities of minors. By the common law males at fourteen and females at twelve can dispose of their personal property by will; neither can make a valid devise of real estate until attaining majority. In this country the matter is regulated entirely by statute, and no distinction is known between males and females.

2. A minor cannot empower an agent or attorney to act for him, nor affirm what another may have assumed to do on his account; consequently, he is not liable for wrongs alleged to have been committed by his agent.

3. In some cases the inability of very young children to be intelligent actors has been recognised. In these the wrong is considered due to unavoidable accident. When malice is a necessary element an infant may or may not be liable as his age and capacity may justify in imputing malice, or may preclude the idea of his indulging in it.

4. A child below the age of seven cannot commit a wrongful act; he is regarded as absolutely irresponsible. Between the ages of seven and fourteen while this presumption exists, it may be rebutted. In the latter class of cases it may be proved that he was of sufficient capacity to have a criminal intention. To warrant this intention the proof must be clear and decisive. Confession of crime is not sufficient unless supported by other evidence. When a child has reached the age of fourteen he is presumed to be capable of committing crime, and to escape responsibility must show affirmatively want of capacity.

In England a boy of ten years old who, after killing a little girl, hid her body, was held criminally liable because the facts showed a mischievous intention. In that country a boy of eight years has been hanged for arson, another in this, four years older, for murder.

5. We have already described the wrongs done to an infant, and when his parent may recover for them. In actions by a minor to recover the ordinary rules of law governing in questions of negligence are applied, modified to meet the changed conditions. Thus, a young child is incapable of contributory negligence, or, in other words, of participating in any way in the

negligence by which he has suffered. Again, a less degree of care is required of an infant than an adult. The degree depends on the child's age and knowledge.

An adult will be held to a higher degree of care in dealing with a minor than with a person of mature age and understanding. When a child is too young to exercise care some courts hold that contributory negligence on the part of his parent or guardian will prevent recovery by the child. This rule is denied by other tribunals.

6. With respect to the liability of minors, the law says the court in a well-considered case, has proceeded rather on the theory of compensating the injured party than of consistently maintaining any logical doctrine concerning the mental attiude of the wrong-doer, and of placing the liability on the wrongful intention. Lord Kenyon once said in the case of an infant who had committed assault or uttered slander, "God forbid that he should not be answerable therefor, in a court of justice." When a wrong is committed by a minor under authority or command of a parent, the latter is liable while his child escapes.

7. A child who is liable for a wrong arising from a breach of contract cannot be deprived of his defence of infancy by changing the form or method of proceeding against him. Thus, he cannot be made liable on a contract by suing him in an action of tort for negligence. On the other hand, a minor who should hire a horse expressly for riding, and not for jumping—which should be killed by a friend while jumping would be liable for doing what he had promised not

to do; in other words, for acting outside the contract.

For a wrong that is not a mere breach of contract, but distinct, a minor may be liable. Thus, should a minor hire a horse to ride, and injure it by overriding, he would be liable.

8. This question frequently arises in actions against minors for fraud growing out of contracts. An action which proceeds on the basis or theory of a contract cannot be maintained. Thus, an action will not lie against a minor for false warranty in a sale of goods, or falsely warranting a horse to be sound. But if a minor fraudulently induces another to deal with him by falsely representing that he is of age, and afterward seeks to avoid the contract, the other party may maintain an action of deceit against him. On one occasion a minor, who represented himself to be of age, bought a quantity of hats of a dealer for the purpose of supplying his store. He afterward declined to pay the bill, declaring and proving that he was under age, and could not make a valid contract for their purchase. The court declared this to be a good defense to the action, and that there could be no recovery on the contract. On the other hand, he had lied to the seller and was liable in an action of deceit, which did not rest on any contract. Moreover, the damages which the vendor could recover in his action of deceit was the value of his goods, so that in the end justice was as completely attained as it would have been in declaring that an infant liar could make a valid contract.

The same rules apply to insurance contracts as to

others with respect to the capability of persons to make them. Whether minors can become members of beneficial associations is still an open question. On one occasion the court said: "Infants cannot make the contract of membership for themselves and it is not clear how the parents can make it for them."[1]

9. A minor may hold an office that is purely ministerial, but not one requiring the exercise of discretion. He cannot hold a public office for the receipt and disbursement of moneys, nor act as administrator. A court would not appoint a minor a trustee because he would not be liable for a breach of trust, and could not give a bond for security of the property coming into his possession. Furthermore, he might be wanting in discretion to execute it properly, though this charge has been sustained against many an older sinner.

[1] Commonwealth v. Keystone Beneficial Assn. 171 Pa., 465; In re Globe Mutual Beneficial Assn., 135 N. Y. 280. Contra.—Chicago Mutual L. Ind. Association v. Hunt, 127 Ill., 257.

CHAPTER XXXII

GUARDIANSHIP

1. Father and mother natural guardians.
2. Testamentary guardians.
3. Chancery guardians.
4. Statutory guardians.
5. Guardian ad litem.
6. Married women as guardians.
7. Executor or administrator as guardian.
8. Guardianship is a personal trust.
9. Consequence of assuming to act without authority.
10. Selection of guardian.
11. Ward's domicile is proper place for appointment.
12. Ward follows domicile of guardian.
13. Guardian's custody of ward.
14. Education of ward.
15. Support of ward.
16. Ward's remedy when necessities are withheld.
17. Support is limited to ward's income.
18. Guardian must exercise care in managing ward's property.
19. Suits.
20. Investments:

    a.—Guardian must use good discretion,

    b.—Rule where no statute exists,

c.—Where statute exists it must be strictly followed.
21. Cannot convert personal into real estate without judicial consent.
22. Management and sale of real estate.
23. Sale of personal property.
24. Should not mingle his ward's funds with his own.
25. Purchase of ward's property by guardian is voidable.
26. Liability of guardian for exceeding his authority.
27. His liability for ward's contracts.
28. Territorial authority of guardian.
29. Guardian must account for ward's property.
30. Final accounting.
31. Arrangements between guardian and ward.
32. Compensation.
33. Gifts from ward to guardian.
34. Mode of terminating guardianship.
35. Removal of guardian.
36. Remedy of ward against guardian.
37. Liability of surety.

1. By the common law the father is the natural guardian of his children, and entitled to their custody during their infancy; on his death the guardianship vests in their mother; on her death in the grandfather or grandmother or any other person who is next of kin. There are, as we have seen, some exceptions to this rule, arsiing from a due consideration of the child's welfare.

The natural guardian of a child has control of his

person only, and not of his property. Formerly, there was a guardianship known as socage, whereby the nearest relative might lawfully receive the rents and profits of the ward's land during infancy. This kind of guardianship exists nowhere in the United States, except perhaps in New York. There the law provides that when an estate in land shall become vested in an infant, his guardianship shall belong first to the father; if there be none, to the mother; if there be neither father nor mother, to the nearest relative of full age, and making further provision in case a guardian does not appear from any of these relations.

2. In England testamentary guardians may be created by will, and this mode of appointing them is in vogue in some states. To be effective the intention to appoint such a guardian must be clearly expressed. The authority is derived from the testator's appointment, and in some states requires no judicial confirmation. When the power has been exercised by a testator the court has no jurisdiction to appoint a different person. In some of the states the appointment is made subject to probate of the will, approval of the court and giving a satisfactory bond. The guardianship extends to the person and also to his estate and continues until the ward arrives at full age.

3. In England guardians are often appointed by the Court of Chancery; in this country the statutes regulate their appointment. This authority is generally excluded by the courts of probate or other statutory tribunals. They are often called statute guardians, be-

cause their powers and duties are determined largely by statute.

4. In Texas a statute providing for the office of a guardian excludes the idea of the appointment of a second to succeed the first before his removal; consequently a person appointed by the will of a father or mother as guardian of the estate of a minor child is not entitled to the appointment of a guardian while another appointed at the father's request in his lifetime is qualified to act.

5. Every court, in which an action is brought against an infant without a guardian, has the power to appoint a person to defend him. For, as he cannot appoint an attorney, unless the court appoint one for him, he would be helpless, as he cannot appear in person. The guardian thus appointed is called a guardian ad litem, and his powers and duties are limited to the defense of the suit. Generally he sues by his next friend.

In appointing him the courts generally respect the claim of the father as the natural guardian of his child to represent him unless his interest is adverse. Nor need the next friend be a relative.

6. It was once against the policy of the law for a married woman to act as guardian; this is no longer the rule. When her husband is unsuitable the appointment has been refused on the ground that she would be under his influence. A non-resident is rarely appointed because he is not amenable to the jurisdiction of the court; in some states this is forbidden by statute.

7. An executor or administrator of an estate in which an infant is interested is not a proper person to act as a guardian, because his duties may clash; the trustee of an infant is regarded with more favour, unless some reason appears to the contrary. A court may appoint a corporation as guardian whenever it is authorised by statute to act in that capacity.

8. The office of guardian is one of personal trust that cannot be assigned.

9. A person who assumes to act as guardian and takes possession of an infant's estate may be treated by him as a wrong-doer, or as a guardian. Says a chancellor of New York, a mere stranger or wrong-doer who acquires possession of the property of an infant and receives the rents and profits may in equity be regarded as his guardian or may be compelled to resign.

10. In selecting a guardian the court has a liberal, but not arbitrary, discretion. It will generally respect the claim of a father to act in this manner. So, too, a person appointed or selected by a testator by his will to act as guardian for his children, the court will, unless there be good reasons for disapproving him, appoint and confirm.

Nevertheless the best interest of the child will prevail even against a father's wish, should he not be a suitable person. When the father is not living the mother will generally be appointed, unless there is a good reason for appointing another. If the child is an orphan the preference will be given to the next of kin as against strangers. By common law an infant

over fourteen can select his guardian, and by statute an infant of that age may generally nominate his guardian, who, if suitable, is appointed by the court.

An infant may appoint a guardian to supersede one already appointed by the court this is not the law everywhere.

11. In appointing a guardian the place of an infant's residence determines the question of jurisdiction, but when a non-resident infant has property within a jurisdiction, a guardian may be appointed there, although the legal domicile of the infant be elsewhere. Residence is always sufficient to confer jurisdiction. An appointment where an infant has neither residence nor property is void. The appointment of a court having jurisdiction can only be set aside by direct proceedings in the same court. In other words, the proceedings to set aside an appointment must be as formal as those appointing a guardian.

12. The domicile of the ward usually follows that of the guardian. This question sometimes is very important in determining the ward's rights and liabilites. Guardians may change the municipal domicile of a ward from one place to another in the same state. Whether a guardian has the power to change his ward's domicile from one state or county to another is an open question.

In all cases, unless the statute prevents, the court has the power to restrain the removal of a ward should his interests be thereby injuriously affected. The court, as the protector of children, has this power, even as against their natural guardian, though it must

be a very extreme or special case to induce interference.

13. A guardian is entitled to the custody of his ward's person as against strangers and all relations of the child, except his parents. The rights of these are generally regarded as superior to those of a guardian. In awarding the custody of a child's person, even as between parent and guardian, the courts will exercise a reasonable discretion, and, when a question arises concerning the right to his custody as between his parent and another, will be largely influenced by the child's best interests. If old enough to have an opinion of his own, the court will also consider his wishes.

The court has a discretion, and the child's welfare is the judicial pole-star. The child must be protected in the enjoyment of his personal liberty, and on arrival at the age of discretion must have his personal interest and safety guarded by the law.[1]

14. The guardian should maintain and educate his ward in a manner suitable to his means from the income of his estate. Although the father is living, a guardian should provide for his ward's maintenance out of his estate, provided his father is unable to provide for him. A court of equity will order an allowance for such maintenance.

15. A guardian is under no personal obligation to support his ward. Therefore, the law implies no promise that he will pay even for his ward's necessities.

[1] The custody and control of an infant child will not be restored against her wish to her father, who transferred her before she was a month old to a relative, who has reared her in happy contentment for twelve years or more. See Tiffany's Persons and Domestic Relations, § 125, p. 254.

Says the Supreme Court of Virginia, a guardian is not responsible either personally or in his fiduciary character for necessities furnished his ward without his consent, express or implied. As he has no authority to make advances from his own means for a ward's maintenance, should he do so he cannot recover the amount advanced after the latter attains his majority. This does not prevent the guardian from advancing the means necessary to support the ward, nor prevent him from reimbursing himself afterward.

Nor will a guardian who, at the time of taking his ward into his family and supporting him, though not intending to charge him therefor, be allowed for his support. And when a child is living with, and supported by, his guardian as a member of his family, and renders ordinary household services, he may set this off against his guardian's claim for maintenance. This is not the law everywhere; by the law of several states a guardian who takes his ward into his family to live with him is entitled to a reasonable compensation for his board and clothing.

16. A court will compel a guardian who should wilfully withhold necessities from his ward to supply them. And a stranger who, during the interval, should supply them, would be reimbursed out of the ward's fortune; but no one can furnish even necessities without the guardian's consent and maintain an action against him for the amount.[1]

When, therefore, a guardian refuses or neglects to furnish his ward properly the remedy is by application

[1] Call v. Ward, 4 Watts & Serg., 118.

to the court, which will dismiss the guardian for neglect of duty, or the infant himself may supply his own needs. If he be so young that he cannot contract himself, a third person may supply his wants.

No consent on a guardian's part can be implied when necessities are furnished without his knowledge, nor can his consent be implied if the consequences are such that the party furnishing them has no reason to believe that the guardian consents.

17. A guardian's authority is limited to supplying the ward's needs from the income of the estate. He cannot exceed the income without judicial leave. If he thinks that a larger sum ought to be expended he can submit the matter to the consideration of the court and act as it may decide. This rule is necessary to protect the ward's property.

18. A guardian has the general management of his ward's estate, and to a considerable degree acts according to his own discretion and judgment. He must exercise ordinary prudence and care. Should he not do so he will be held liable for the consequences. Too often he has abused his trust. For this he can be called to account by the court during his guardianship, or else by the ward after attaining his majority.

In one of the cases a court has remarked that the fiduciary relation requires vigilance as well as honesty. A dead and sluggish calm, a supine negligence is full of peril to a minor; it is often as fatal as positive dishonesty.

19. In a general way a guardian's duties and powers are like those of an ordinary trustee. He should take

possession of his ward's property of every kind and enforce any claim the ward may have against other persons to any kind of property. To this end he may maintain suits whenever they are necessary.

Legal proceedings should ordinarily be conducted in the ward's name, but many of the rules pertaining to them are technical, and need not be considered here. A guardian may compromise claims against a ward's estate and his submission of them to arbitration will be binding. In a suit brought by a guardian to protect his ward's property an allowance will be made for advice and legal service. A guardian cannot charge his ward with attorney's fees made necessary by his own negligence.

20. (*a*) The general rule is everywhere recognised that a guardian or trustee in investing property must act honestly and faithfully and exercise a sound discretion, such as men of ordinary intelligence use in their own affairs.

(*b*) In the states without statutes prescribing how the funds of a ward shall be invested the courts are not in harmony. Generally, investments in public or real securities, like government bonds and real estate mortgages, have judicial sanction; also, investments in the stock of corporations, especially of railroad and banks that are solvent and pay regular dividends. On the other hand, guardians and their sureties are generally responsible for losses on investments made on the credit of individuals or firms. Personal security is not deemed sufficient.

In many states this subject is carefully regulated by

statute. It should be carefully observed, for, should a guardian do otherwise, though with the most reasonable expectation of obtaining a larger return for the ward, he would, in the event of a loss, be responsible. His good intention would be no legal defense.

(*c*) A guardian who is appointed in a state outside his ward's domicile should not, in accounting for his investments, be held to a narrower range of securities than is allowed by the law of his domicile.

21. A guardian cannot convert personal into real estate without judicial consent, nor can he erect buildings on the land, nor make permanent additions to them, but he can pay taxes and encumbrances out of the income of the estate, when such action is necessary for the preservation of the property, without a judicial order.

22. In managing his ward's real estate a guardian may lease it for a period not longer than the ward's minority. Should he make a longer one his ward may avoid it on attaining his majority for the excess. The guardian may cut timber when this will not amount to waste, but cannot lease mineral lands without judicial authority. If he occupies the ward's lands himself he will be liable for rent, also for depreciation caused by improper cultivation. He must keep the buildings in repair unless the income is insufficient. Should they not be rented or injured by his neglect to repair them he would be liable.[1]

The sale of a ward's real estate is regulated almost everywhere by statute, and is done by judicial order.

[1] Tiffany, § 174, p. 335.

Greater authority is given to a guardian in dealing with the ward's personal property. A sale made by a court without jurisdiction is annulled and at any time may be attacked. But when having jurisdiction, the sale cannot be attacked collaterally, or in any other proceeding for irregularity.

The authority of a court ordering a sale must be strictly followed, otherwise it will be invalid. The guardian must be properly appointed, and the deed must have all the requisites needful to its validity. It must show the authority on which the guardian acted; in short, must contain a full description of the power whereby the guardian proceeded in selling his ward's estate.

23. In some cases a guardian is restricted from selling without judicial order his ward's personal property. It has been said that the purchaser will acquire a good title thereto, if sold in good faith, even though the law has not been strictly regarded. "Having the power to sell," so a court has remarked, "without obtaining any special license or authority, a title under him acquired bona fide by a purchaser, will be good, for he cannot know whether the power has been executed with discretion or not, and an estate is always supposed to be secured by a bond given by a guardian for the faithful execution of his trust and discreet management of the property."[1]

24. A guardian ought not mingle the ward's funds with his own in the same bank account. Happily for the ward, should his guardian violate this plain

[1] Ellis v. Proprietors, 2 Pick., 243.

principle of law, he is a kind of preferred creditor, so to speak, should the bank fail, and may recover money in preference to all other creditors, except those toward whom a special trust relation somewhat like his own exists. His right to recover is complete in all cases whenever the trust property exists, or can in any form be identified. Formerly this principle had less value for the reason that after the misappropriation of a trust fund too often it could not be recovered because it no longer existed. But since the adoption of the modern conception of a trust fund, including the original property or any other that has been substituted therefor, there is a greater opportunity for recovering the trust fund in the event of the depositor's failure; consequently a ward recovers with increasing frequency the property misapplied or misused by his guardian.

Some courts adopt a less stringent doctrine and do not subject the guardian to a loss whenever he has acted in good faith. Cases have happened, therefore, in which a guardian has put the money of his ward in his own name, not with the view of committing any fraud or of gaining a personal advantage, but it may be with the expectation that in some way the ward would be the gainer, perhaps be subjected to less taxation. Some of the courts have decided that a guardian who thus acts in good faith, and with no intention of wronging his ward, cannot be held personally liable.

A guardian who uses a wards' money in his own business, or otherwise converts it to his own use, is

guilty of disregarding the law and will be charged with compound interest.

25. A purchase by a guardian at a sale of his ward's property may be set aside as voidable. Formerly the law condemned such a sale as contrary to public policy, or as inconsistent with the guardian's duty. This is only another application of a great principle that an agent ordinarily is not permitted to purchase his principal's property for himself, even though he pay an adequate price therefor, because the temptation for wrong-doing is so very great. Nevertheless, the modern rule is greatly relaxed in this regard and, instead of holding such sales to be absolutely void, they are usually voidable. In other words, in the case of an infant or minor he has the right of inquiring into a sale in every case, and can set it aside should he deem it against his interest or tainted in any manner with fraud.

Again, a guardian who should under this broad principle buy the property of an infant ward before the latter has reached a period of comprehending the nature of the transaction, the rule would apply. Numerous cases of this kind have occured, in which a guardian has taken advantage of his position to defraud his ward. Should the court learn of his conduct he can be speedily brought to account, removed and compelled to respond for the wrong. Such a discovery and subsequent action are sometimes the work of some relative or friend of the ward. Should the transaction be buried and kept in the dark until the ward arrived at age or afterward, then he could pro-

ceed against his guardian for an accounting; for running through the entire fabric of the law is the principle that time does not obliterate a fraud, though it does obliterate or end an ordinary business transaction. A man gives a note to another and either neglects or forgets to pay within a specified period. After that time the law puts an end to the transaction unless the maker acknowledges his obligation to pay. The statute of limitations as it is called, works in this manner, and is very wide in its operation. Happily, this statute does not run in cases of fraud between a trustee of any kind and his beneficiary. Therefore, after the beneficiary's discovery of the fraudulent conduct of his guardian, he has a right to proceed against him at any time within the statutory period. In other words, no statute of limitations runs against a guardian or other trustee until six years or longer period after the fraud hase been discovered by the beneficiary or ward, and six years or longer after he has attained his majority, or is capable of acting independently in enforcing his rights.

When trust property has been wrongfully taken by a trustee the ward may assert his right to the specified property in two ways. One of these is to follow it into the possession of the person to whom it had been conveyed, unless he is a bona fide purchaser for value without any notice that it was trust property. The other way is to follow the property that has been substituted for the trust estate, so long as this can be traced.

26. A guardian who acts beyond the scope of his

authority, though with good faith and intentions, will be personally liable. If such action is beneficial to the ward the guardian is protected and the ward will take the benefit. It is on this principle of justice that a minor, after attaining his majority, is permitted to make his election to adopt and confirm the contracts of his guardian, though made without authority of law, that are to his advantage and to repudiate those that are injurious. Thus, should a guardian sell the land of his ward without legal authority, he can elect to accept the price, or reclaim the land when he comes of age, whoever may be the purchaser.

Again, as an administrator cannot by his promise bind the estate of his intestate, neither can a guardian by his contract. But a guardian who creates a liability in excess of the estate is personally liable for the excess.

27. On the contracts of his ward a guardian may render himself personally liable, but in proper cases he is entitled to be reimbursed out of the ward's estate.

28. The authority of a guardian is confined to the county or state of his appointment. Unless his appointment is recognised as a matter of comity by a sister state or foreign court, he has no right with respect to the person or property of his ward therein.[1] But the authority of a foreign court is sometimes recognised by comity. And in making a new appointment the

[1] In a recent case, decided in New Hampshire, the court held that though by comity the rights of a guardian appointed by one state to the custody of his minor ward, living with his consent in another, may be recognized in a habeas corpus proceeding brought by him in that state, yet the controlling consideration in determining whether the ward should remain where he is, or be placed with the guardian is, which will best promote the ward's welfare. Hanrahan *v.* Sears, 72 N. H., 71.

request of a foreign guardian to be appointed is generally respected.

In many states there are statutory regulations authorising a foreign guardian to act on complying with proper regulations, the filing of a certified copy of his appointment, and the giving of a bond.

It is often needful for a guardian to act in a foreign state because the ward has property there. Thus, a ward living in Pennsylvania may be the owner of stock in a New York bank, and his guardian is desirous of having the stock transferred to himself in his official capacity as guardian. In such cases the filing with the New York bank of a certificate of the guardian's appointment in Pennsylvania would ordinarily be sufficient authority to justify the bank in making the transfer desired. But banking and other institutions are extremely particular and sometimes require a person to be appointed in their own state before recognising his right to act officially as a guardian.

29. A guardian must file an inevntory of the property of his ward's estate, prepared by disinterested persons, and render an account thereof from time to time, usually annually. Such an inventory or account is not final or conclusive of the facts contained therein but, as the books say, is prima facie correct. In other words, the facts are presumed to be correct until they are disproved.

30. At the end of his term of office the guardian must render a final account of his stewardship, and this account, like all others, may be examined or at-

tacked on the ground of fraud or mistake. Very often such accounts are passed at the time of rendering them, because there is no one to dsipute them, as a ward from year to year has no knowledge, in many cases, of his affairs, except that derived from his guardian. After attaining his majority and coming into possession of his property, which must then be turned over to him, he often makes the unwelcome discovery that his guardian has been neglected or unfaithful in administrating his trust. He then can apply to the proper tribunal to have the accounts opened and re-examined, or, if without a remedy of this kind, a court of equity is always open to him, and such relief may be granted as justice shall require.[1]

31. All arrangements made between a guardian and his ward are regarded by the court with suspicion. Not infrequently they are examined and set aside. Furthermore, the final settlement of a guardian's account is by no means final. In a court of law the moment of emancipation, so a court has remarked, from legal pupilage is the moment of absolute power and unlimited capacity. A court, therefore, extends its watchfulness further, and requires that the discharge of the guardian shall not be precipitated; that ample time shall be allowed for consultation and inquiry; that there shall be a full exhibition of the estate and of its administration.

32. With respect to compensation, no regular commission is fixed by law, and the matter is largely within the discretion of the court. Should the estate be large the compensation is graduated.

33. A gift from ward to guardian during guardianship is presumed to have been made by undue influence, and will be set aside unless it is shown to have been entirely voluntary and clearly understood by the ward. Nor will lapse of time ratify the gift.

For the same reason a gift or conveyance to a guardian made by his ward shortly after the termination of the guardianship is presumed to have been made under undue influence and will be set aside unless it is shown to have been entirely voluntary.

34. A guardianship may be ended in several ways. The first is by the attainment of the ward's majority. But if a guardian continues to manage his ward's estate after his majority without making a final settlement, this will constitute in effect a continuation of the guardianship. In other words, he is said to be acting as a *quasi* guardian; "and must account for all transactions on the same principles which govern his acts during the ward's minority." [1]

Of course, guardianship ceases on the ward's death. The guardian has no right to administer his ward's estate, but must adjust his account with the ward's legal representatives.

Again, on the guardian's death, his executors or administrators have no authority to act as guardian, but must settle the accounts of the guardianship and pay the balance to the successor.

When there are joint guardians and one dies the survivor can continue the trust.

[1] Tiffany's Persons and Domestic Relations, § 186, p. 348.

The guardianship of a female ward is terminated by her marriage, but the guardianship of a male ward who marries under age continues.

The marriage of a female statutory guardian does not terminate the guardianship. By statute the law is otherwise in some states; in others her husband becomes the joint guardian with her.

A testamentary guardian has no right to resign, but when he refuses to act the court may appoint a successor.

Statutory guardians are often permitted to resign from office, and when there is no provision on the subject their tender of resignation is sufficient ground for appointing another.

35. Courts of probate, surrogates, and similar courts have authority to remove guardians. Generally, their authority is ample enough to remove guardians of every kind; of course, this is not done without cause. There may be a great many causes justifying such action on the part of the tribunal.

Some of these may be mentioned; for example, his own personal use of his ward's property; his failure to apply the income to his ward's support; wasting the estate; failure to file inventory of the ward's property when ordered; personal interest offered to that of his ward; immorality or bad habits, conviction of a crime or any cause rendering him incompetent to manage the estate. Insolvency is not a necessary disqualification, but it is often a good reason for removal. Again, a guardian who has obtained his appointment through false representation may be removed.

36. For misapplying his ward's funds what is the remedy? The ward cannot recover damages during the guardianship, though if he should be assaulted by his guardian this might be a ground for his removal or for redress in criminal courts.

A court of proper jurisdiction can make such orders during the guardianship as are needful to protect the ward's estate. Again, a bill in equity may be brought by a ward through his next friend to compel his guardian to render an account. An action will lie against a guardian who retains his ward's property after the close of the guardianship to recover it.

37. Guardians are required to give bonds with security that are satisfactory to the court for the faithful discharge of their duties. Nor have they any authority to act until this is done. A guardian and his sureties are responsible for all property of whatever kind coming into his possession, as well as all losses accruing through his failure to perform his duty. The sureties are not liable for property received or acts performed after the guardian's final discharge.

The termination of a guardianship does not relieve his sureties from liability for property received and acts committed during the guardianship. Should a surety die his estate would be liable. An action on a guardian's bond will not lie usually until the guardian's liability is determined by the settlement of his final account.

Sometimes a special bond is required; for example, on the sale of real estate by a guardian under the

license of the court. In these cases the sureties thereon are liable for any failure on the part of the guardian to execute his authority to sell property, and not the sureties on the general bond.

CHAPTER XXXIII

EMPLOYER AND EMPLOYEE

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1. Formerly, the law of apprenticeship was very common, and the most rigorous rules regulated its formation and maintenance. Now, perhaps in every state the relationship is chiefly regulated by statute. Doubtless the law everywhere requires the articles of apprenticeship, whether between minor and master, or between father or guardian and master, to be in writing and sealed. The minor is not required to join in the deed itself.

2. The master has a right to the service of his apprentice, and to his wages earned by serving others. He cannot, however, assign an apprentice to the service

of another. A right of action exists against anyone who entices away an apprentice from his master, or knowingly harbours him after leaving without cause.

3. The way is now clear for considering the larger subject of the relationship between master and servant. A servant is one employed to render a personal service to his employer otherwise than in the pursuit of an intelligent calling, and who, in rendering such service, remains entirely under the control or direction of his employer or master. A servant, therefore, includes a bookkeeper or clerk of a business office, a salesman, builder, workman in a factory, etc.

A man cannot compel another to labour for him; on the other hand, a person cannot perform a service for another, and render him liable therefor, without his consent. A servant, therefore, who should engage in temporary work for another by the false representation of a person, that he had been directed to employ him for a master, would not establish the relationship of servant, rendering the master liable for the service performed.

4. The contract for service need not be put in words, either written or spoken; it may be implied from the conduct of the parties. Thus, should a man labour for another at his request, or with his knowledge and consent under such circumstances as to give rise to the belief that a compensation is expected, the law would imply a contract, and the servant could recover compensation for his work.

A service performed for another without his knowledge does not imply a contract between them. Again,

when the parties are related in a family way, and the service is performed by one in the way of performing household or other familiar duties, no presumption arises of an expected payment. In order to recover therefor a contract must be positively shown.

After the expiration of a contract of hire for a specific period, and a servant continues in his master's services with his consent, and without a new agreement, a new contract of hiring is implied on the same terms and for the same period as the former, unless there are circumstances showing a different intention.

5. The contract of hire in many respects is governed by the same principles of law as apply to all other contracts. The promise must be mutually binding, for if there is not mutuality the contract is void as in other cases.

6. In like manner the parties to make a valid contract must be of full age. Should an infant enter into a contract of service it would not be binding on him, and he could at any time thereafter leave and recover for the value of the service.

On the other hand, the other party is bound to a minor who chooses to hold him liable on his contract.

7. We have already shown how the statute of frauds affects many contracts. In some states this statute also applies to the contract of hiring. In these, to be binding, it must be performed within a year, or be in writing. A contract, therefore, for a year's service which is to begin at a future date is within the statute and cannot be enforced. A contract for a year which is to begin at once, or without any stipula-

tion for beginning, is not affected by the statute. Hence, for services performed under the contract there may be a recovery for their value.

8. A contract for indefinite service may be ended at any time by either party. The circumstances may show a contrary intention, and when this is proved it must govern. The payment of wages at specific periods does not necessarily show that the hiring is for a specific period, and not a hiring at will. On the other hand, it is not a hiring for a longer period than is specified.

A hiring to last as long as each party is satisfied may be terminated at any time by either of them.

9. The relationship may be ended in various ways. One way is by fulfilment. Another is by the death of one or the other; and another way is by agreement that it shall no longer be binding.

10. Sometimes a new contract is substituted for the old one. This operates as a waiver and the rights of the parties are of course fixed by the new contract.

11. Sometimes the contract gives a party the right to terminate it on a particular condition. A servant, for example, who is employed to work for a specific time according to the master's satisfaction, may be discharged whenever the master truly becomes dissatisfied with him. In such cases the master is the sole judge to determine whether the servant is satisfactory or not.

The right of an employee who has made a contract for employment as long as his work shall be satisfactory and to quit work at his option as a part of a

compromise of a claim for damages for injuries received in the service of the master, does not give the employer a reciprocal right to terminate the contract at pleasure, since the employee by refusing his claim is paid a valuable consideration for the option.

12. In England and in many of the states contracts for hiring for a specific period are regarded as entire, and a servant is not allowed to recover for his service unless he proves full performance. Thus, a servant who wilfully abandons his master without cause before the end of the term, or is guilty of such a breach of contract as justifies his master in discharging him, cannot recover on the contract, even for the services actually rendered prior to the abandonment or discharge of it.

To a contract that is divisible a different rule applies. Even though the abandonment or dismissal was wilful, an employee can recover for the service he has rendered.

13. Of course, a servant who has not performed his entire contract is nevertheless entitled to wages if he has a legal excuse for non-performance. Thus, should an employer die before the end of the term or period of service, wages may be recovered of the personal representative of the deceased for the service actually rendered.

14. Though a servant cannot recover on a contract which he has himself broken, some courts hold that he can recover on an implied contract whatever his service may have been worth. Whenever this rule prevails the master has the same right to sue the servant for

any injury he may have received in consequence of the servant's unlawfully breaking the contract, and can recover damages if any has been sustained by reason of the other's neglect or unwillingness to fulfil his contract. But he cannot remain idle during the term for which he was hired, and then, at the end of it, bring an action to recover wages for the entire term. It may be said, therefore, that the measure of damages in such cases is the wages he would have earned under the contract, less any other amount he has actually earned in other employments, or which he might have earned by the exercise of proper diligence in seeking employment along the same line of business. This is the general rule now enforced in the various states.

15. The servant of a master who renounces the contract before the time of its completion may treat the contract as broken and sue at once for damages without holding himself ready or offering to do more. The same thing is true when a master, either before the time for beginning or while the servant is working, does some act making its fulfillment impossible.

16. The other party, however, has the option to regard the contract as in force, or as ended. Thus, the servant of a master who discharges a servant without cause need not treat the contract as ended; he may be ready to continue his work, and when thus acting can recover for each instalment of wages as it falls due during the period for which he was employed. But this is not the law everywhere, some courts holding that, after a master has broken his contract, the

hiring is at an end and that the servant may sue for the injury he has received.

17. A contract may be affected by custom or usage; thus, in many places the custom exists of giving a month's notice before terminating a contract, which is legal. By dismissing a servant at the end of a month's notice, employed by virtue of a contract with this provision, it is discharged but not broken.

18. There is an implied contract on the servant's part that he is competent to discharge his duties. For incompetency he may be dismissed, and in doing so there is no breach of the contract. Hence, a servant may be discharged who is unfit by reason of intoxication, or other cause, fully and property to perform his duties.

19. He may also be dismissed before the expiration of his term for criminal or immoral conduct wilful disobedience, habitual neglect of duty, for larceny or embezzlement, either from a master or from a third person; for cheating or defrauding his master. Thus, should a servant, a cashier, overdraw his salary. his master would have a good reason for discharging him.

20. The dismissal has been justified of a house servant who went to see her sick mother supposing her to be dangerously ill; this is carrying the principle too far. A dismissal was in one case justified of a servant who refused to go on an errand without his dinner; in another of a farm hand who refused to work without having his beer; in another case, of an employee who smoked in his shop in violation of rules.

The general rule, however, governing all cases of disobedience is that such an act, to justify dismissal, must involve injury to the master. Says the court: "Wilful disobedience means something more than a conscious failure to obey. No doubt domestic discipline must be more rigid than that in business employments, but there must be a limit to the arbitrary power of the master."

A servant who seriously injures the business of his master by his deportment may be dismissed, but slight discourtesies, exhibitions of ill-temper, are not sufficient cause for dismissal.

A servant who without his master's consent enters any other employment or business for himself which may tend to injure his master's business is a good ground for dismissing him. This is so because it is the duty of the servant not only to give his time and attention to his master's business, but, by all lawful means at his command, to protect and advance his master's interests.

21. Another cause for dismissing a servant is the impossibility of performing a contract. This arises from a change in the law, or by judicial action. Also when the object for which the service was to be performed is destroyed without failure of either party, or by the death of either party, or by the unfitness of a servant caused by illness or personal injury, or, lastly, by the prevalence of a contagious disease in the vicinity where the servant is working which renders the place unhealthful. The master's insolvency does not discharge him from the obligation to pay the ser-

vant for the full term, or justify him in refusing to pay damages for not executing the contract.

22. A servant who has been ill-treated by his master may leave and recover as though he had been wrongfully discharged. Of course, the non-payment of wages as required by the agreement is a breach of the contract.

23. A master who wrongfully discharges his servant cannot by ordering him to return to work afterward put the servant in the wrong. After he has been wrongfully dismissed the contract is broken by the master and the servant need not return, even though requested.

24. The master may condone or waive his servant's conduct and having done so cannot afterward justify his future dismissal, or defeat an action by him for wages.

25. A servant is always liable to his master for a violation of his duty whereby his master is injured. Thus, he must labour with due diligence and fidelity and with as much skill as persons of ordinary capacity who are engaged in the same business or employment usually exercise. A servant is as much bound to exercise reasonable care of his master's property as the property of other persons.

In like manner he is liable to his master for injury caused by his negligence to the property of third persons entrusted to the master. A servant who uses in his own business his master's property is liable to the master for its value.

26. A conspiracy between servants to injure their

master in his business gives him a right of action against them for any damages he may sustain. Thus some tailors, by virtue of a conspiracy between them, stopped work for their master and simultaneously returned his garments in an unfinished and worthless condition. As he was unable to get workmen to finish them, the conspirators were liable to an action for the injury sustained by their employer.

27. The master of a servant who is enticed from his service can maintain an action against the enticer. Even though the relationship between them can be terminated by either at will, this is a sufficient foundation for the action. Again, a master can maintain an action against one who assaults or imprisons his servant, whereby he loses his service. As a master has a right of action against one who maliciously induces his servant to leave him, so an action will lie in favour of a servant against a person who has maliciously induced the master to discharge him from employment.

28. A master is bound by the act of his servant for any injury done by the master's authority. While this general principle is well established, it is extremely difficult to apply it and determine in what cases the servant is deemed authorised by the master.

It may be said that the master's liability depends on the general law of agency, that he is liable for the act of his servant when he has authorised him to act as an agent, or has pursued such a course of conduct as to lead persons to believe that he was acting as his agent.

29. The test of a master's responsibility for the act of his servant is, whether the act was done in the transaction of his master's business. When, therefore, he deviates from his instructions, this does not relieve the master from liability for his acts while thus engaged.

Another view of the subject has been taken by the Supreme Court of Ohio. It is declared that "where a person is injured by the act of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences in the absence of a particular intention, it is not perceived how the presence of his intention can be held to excuse the master."[1] Thus, it has been repeatedly held that for the act of a conductor or other employee of a railroad train who unlawfully assaults and injures a passenger or even a trespasser, the company is liable, notwithstanding the servant acted wilfully and from personal malicious motives. His conduct is none the less in the course of his employment because of his motive.

The rule would be different if the conductor or brakeman should wilfully and maliciously assault a mere stranger to whom the company owed no duty at all.[2]

30. The master is also liable after he ratifies the

[1] Passenger R. v. Young, 21 Ohio St., 518.

[2] A railroad company has been held liable for the consequences of an act of a locomotive engineer in blowing the whistle and following steam to escape, whereby horses were frightened in cases where he acted wilfully and maliciously.

servant's act, whatever it may be. The law seems to be well settled in this regard. The cases are very numerous in which the master becomes clearly liable by thus making an act of his servant his own.

31. Ordinarily a servant is not personally responsible on authorised contracts entered into by him in his master's name. When, however, he makes contracts without disclosing his agency, or exceeds his authority, he is liable and is governed by the general principles of the law of agency applying to such cases.

32. A servant is liable for criminal acts, though his master may have commanded him to commit them. A servant is bound to perform the lawful command of his master, but not those that are unlawful. Such a principle would justify a servant in committing any crime. Even though the servant be ignorant that he is committing an injury, yet if the thing done is an injury, he is liable, though done by the command of his master.[1]

33. For an injury done by a servant, either fraudulently or wrongfully, while in his master's employment, both are liable even though the act may have been done contrary to the master's orders. Again, for an injury resulting from negligence or lack of skill, on the part of the servant, both are liable. Says the court on one of these occasions: "In one sense, where there is no express command by the master, all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of

[1] No implication of authority on the part of a railroad station agent to employ third persons to watch the station and catch burglars arises from the fact that he was authority to do such acts himself.

the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown."[1]

34. A person who employs an independent contractor is not liable for his wrongful conduct, or that of his servants who are at work with him. This has been determined on many occasions. Thus, on one of them it was held that a person who employed a public licensed drayman to haul barrels of goods was not liable for injuries inflicted by the latter by rolling a barrel against a person. The owner of land who employs an independent contractor to erect or repair a building on his lot is not liable for injuries resulting from the acts of the contractor's servants, however negligent they may be, whereby others are injured.

35. A different rule applies when the work is unlawfully constructed or creates a public nuisance. In such cases both the contractor and the owner are liable for the resulting injuries. Thus, a person who, without authority to excavate in a highway, employs a contractor to do this for him is liable to any person injured by the excavation, and so is the contractor.

36. Formerly the question was often considered by the courts concerning the correction a master could exercise over his servants. It is now said that a

[1] Evans v. Davidson, 53 Md., 245, 249.

master who chastises his servant, whether he be an adult or a minor, is guilty of assault and battery, and is liable both in the way of damages and also to a criminal prosecution.

37. A master or servant has a right to defend the other, and either can justify a battery in defense of the other.

38. It is a fundamental rule that a man is not liable for the wrongs done by another. It is, however, no less true that a master is liable for the wrongful or negligent acts of his servant that are done within the scope of his employment and while pursuing his master's business. The various rules in confirmation of this have been already mentioned.

In 1837, however, another principle was announced of far-reaching consequences, namely, that a master was not liable to one of his servants for the injury caused by the neglect of another. The case in which this principle was first declared may be briefly stated. A butcher employed a man, and requested him to go with some goods in a van driven by another servant. The man went as requested, but the van being overloaded, broke down, and the man was thrown off and sustained severe injuries. He sued his master, and the court decided that he was not liable because the injury, of which there was no question, was caused by the negligence of another servant. Lord Abinger, who gave this decision, considered the question at great length, and especially dwelt on the absurdities of prescribing a different rule. The courts in this country readily adopted it, perhaps without fully realis-

ing the consequences to which its application would lead. No rule of the law has ever given rise to so many difficulties and complications. We shall in as brief space as possible seek to give the principal rules springing from this decision.

39. By this rule an employer is not an insurer against all accidents that may happen to his employees. On entering the service of another one takes on himself, in consideration of the compensation he is to receive, the ordinary risks of the employment, including the negligence of those around him. This is the most general principle that applies between master and servant. An employee assumes by contract the risk attending his employment. The law declares that he knows what he is doing. The immunity of the master rests on the contract of hiring. Says the Supreme Court of New Jersey, putting the words into the mouth of a servant, "You understand fully the nature of the employment and the danger attending it; will you enter it?" The servant says, "I accept it," and the law implies that he accepts with it all the risks incident to it without regard to the magnitude of the dangers.

40. This rule as well as others of the common law prescribing the duties and liabilities of employers to their employees have been radically changed by the compensation acts, which have been adopted in nearly forty of the principal states. By these a liability is imposed on the employer for any accidental injuries to his employees arising from the employment. Nor is it conditioned on the employer's negligence, or the employee's want of negligence. The compensation acts

ordinarily require that the injuries shall not have been caused by the employee's intoxication or wilful misconduct, and they set aside the common law rules of assumption of risk, contributory negligence, and negligence of fellow servants.[1]

41. One of the most weighty questions in applying these acts is, who is an employer within their meaning making him liable for his negligence to his employees. And it is often said that the proper test is, does the employer possess power to control the other person concerning the matter out of which the injury arose. Ordinarily, one who is engaged to render services in a particular transaction is not an employee; this means continuity of service and excludes those who are employed for a single and special transaction. It does not usually include physicians, pastors, professional nurses, or public lecturers; but may include persons not engaged in manual labour like school teachers. That a workman furnishes tools and materials, or undertakes to do a specified job, or produce a given result, will not prevent him from serving as an employee. A deaconess, living and working in a hospital and receiving an annuity to cover her clothing and personal expenses, is not an employee of the hospital, neither are nurses in training working under the same arrangement. An employee is not precluded because he is paid by the job, or by the piece, or is employed by the day, or is a student workman, or is an officer or director of the corporation employing him.

42. Again, to establish the relations of employer and

[1] See 1 Honnald's Workmen's Compensation, § 4, p. 16.

employee, there must be a "contract of service" distinguished from a "contract for services." The former relationship brings one within the act, while the latter regards him as an independent contractor and excluded from the act. The contract of service need not be in writing, but may be implied, for example, when a substitute is engaged by an employee in accordance with a well established custom. A contract of service, does not arise from the relationship of landlord and tenant, carrier and passenger, bailor and bailee, from the rendering of professional services, from a partnership relation, from the performance of manual labour without subjection to the employer's control, or from sailing on a ship on the sharing system without subjection to the owner's control. Whether a contract of service arises from the performance of work given out of charity depends on the circumstances of each case.

43. The meaning of the term labourer used in the several federal acts has been construed in many cases. A statement too lengthy for our space would be required to describe them.

44. Compensation legislation does not confine its protection to healthy employees. The previous condition of health is of no consequence in determining the amount of relief, though it is a circumstance to be considered in ascertaining whether the injury results from the work or from disease. And if the injured employee is a minor, this fact does not bar the recovery of compensation in California or Iowa, but does in Massachusetts and Wisconsin.

45. A provision excepting "farm labourers" from

the operation of the act, puts outside one who is employed to do the ordinary work of a person hired by a farmer to aid in the common incidents of agricultural employment, but does not except employees working for one engaged in a commercial or other non-agricultural enterprise.

46. An agreement excepting employees engaged in horticulture excludes an employee working as a nurseryman and gardener in setting out trees and plants. The right to compensation is determined by the character of the labour at the time of the accident. The purpose for which the work was done determines its character. Thus farming is usually farm labour, but if done to prepare land for railroad or other construction, it is not farm labour.

47. The term domestic servant, within the acts excluding domestic and household servants, means one who lives and works in the house, and does not exclude a servant whose employment is out of doors. The status of a household servant is determined rather by his relation to the family than by his relation to the service. Thus a workman who is hired to tend the furnace, mow the lawn, and do odd jobs about the house and premises who has a sleeping room in the house, eats at the family table, is a household servant. On the other hand, a chauffeur hired by the month to run the employer's auto, but not living as a member of his family, is not a household servant.

48. Within the Iowa act the term workman includes those engaged in clerical work, but does not include one standing in a representative capacity to the employer.

A partner therefore or managing officer is not entitled to a compensation.

49. That a workman's employment is casual or intermittent does not deprive him of the status of employee unless the statute says so. But many of the acts exclude from their protection casual employees, excepting in some cases municipal and other public employees, and it is important to know who is a casual employee. No hard and fast definition of casual can be adopted. The word as commonly used, means something irregular, occasional, incidental. Ordinarily an employment for a single day, or by the hour, is casual, but not whenever one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuing for a reasonable time. Thus one employed as a workman in a saw-mill on active days during a period of four months was not a casual employee. An employment is not casual because it lacks a specified length of time.

The word casual has been stricken from the Man act so that all employees engaged in the usual course of the trade, business, occupation or profession of their employer, except masters of, and seamen on, vessels engaged in interstate, and in foreign, commerce will receive compensation.

50. The compensation law does not apply to an injured person who is an independent contractor for the relation of employee and employer does not exist between them. It is not possible to lay down a hard and fast rule to define which of the two relations exists in every case. A contractor is ordinarily one who

carries on an independent employment and is responsible for the results of his work; one whose contract relates to a given piece of work for a given price. More generally, an independent contractor is one who exercises an independent employment and contracts to do a piece of work according to his own method, without subjection to the control of the employer, save in the results of his work. One test, sometimes said to be decisive, is who has the right to direct what shall be done and where and how, and who has the right to the general control. When the doing of specific work is entrusted to one who exercises an independent employment, and selects his own help, and has the immediate control of them, and the right to control the method of conducting the work, he is an independent contractor.

51. That one may come within the federal act he must be employed by the United States; he cannot be a contractor. A plate printer in the Bureau of Engraving and Printing and who is paid by the piece, a contract die-maker who is thus paid and hires and pays his own help, are contractor, not employees of the United States. A workman employed by a government contractor is not employed by the government.

52. Since public officers are not entitled to compensation as employees, they must be distinguished from other employees. Judge Cooley has said: "The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath and perhaps to give an official bond; in the liability to be called to

account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position. A policeman is not an employee, but an officer, holding an office of public trust, unless the statute says otherwise. But a village night marshal performing the duties of a policeman at night, is an employee by the Wisconsin act. Firemen and deputy sheriffs on a fee basis are officers rather than employees.

53. Compensation acts are founded on the theory of compensation, not only to the injured workman, but to his dependents in case of his death. A dependent is one who looks to another to support, one dependent on another for the ordinary necessities of life, for a person of his class and position. To be entitled to compensation as a dependent, one need not deprive himself of the ordinary necessities of life to which he has been accustomed, but he cannot demand compensation merely to add to his savings or investments. Compensation cannot be awarded to alleged dependents not belonging to the classes of relatives described by statute. A statute authorizing compensation to actual dependents will be literally construed to allow compensation to the dependent parent of a deceased workman, though he has left no surviving wife or child, and no specific amount of compensation is fixed for such a case.

54. The phrase "actual dependents" means dependents in fact, whether wholly or partially dependent. Partial dependency, giving a right to compensation may exist, the contributions being at irregular intervals

and of irregular amounts, though the dependent may have other means of support and is not reduced to absolute want. But it exists only to the extent that the deceased workman contributed to the support of the dependent. Payments made for other purposes than for support constitute no part of such dependency.

55. Compensation is awarded on the basis of total dependency, where the dependents subsist entirely on the earnings of the workman. Persons are not precluded from being totally dependent by the fact that temporary gratuitous services have been rendered, or occasional money has been sent to them by persons other than the workman, that they hold small savings accounts, that they have been supported in part by the workman's income other than his wages; or that money furnished for their support by the workman has not been paid directly to them.

56. The fact that a dependent is an alien living in a foreign country does not, of itself, bar compensation. Children entitled to compensation as dependents include step-children, illigitimate children, especially if living with the workman and were supported by him, also adopted children.

57. A dependent's right to compensation will survive, and if not satisfied before his death will pass to his or her personal representative, unless the statute provides otherwise.

58. The federal act of 1916 provides that if the injured artisan of labourer die within the year leaving a widow, or a child or children under sixteen years of age, or a dependent parent, they shall be entitled to

compensation. The word includes both parents, but does not a step-father or step-mother, or foster parent. But if legally adopted, such dependent parent is within the law.

59. Earnings which by these acts are made the basis for computing compensation, include not only money whether received as regular wages, as extra wages, or as gratuities called tips; also anything having a money value, such as board, lodging and washing. The object of this legislation, broadly stated, is to compensate for loss of capacity to earn, measured by what the workman can earn in the employment under the conditions prevailing before and until the time of the accident. That he takes a holiday and forfeits his wages for a month, does not interfere with his earning capacity. So, too, if a casualty accidentally stops the work. But when it is part of the employment to stop for a month in each year, he cannot earn wages for that time in that employment, and his capacity to earn is lessened accordingly. In the average earnings for a particular computing period, the nature of the employment, its terms, its actual duration, and the personal qualification of the workman may all be taken into consideration.

60. An employer who is wrongfully discharged before the expiration of the term of his employment is entitled to the wages he has actually earned by the terms of his contract to the time of his discharge; also to wages for the unexpired portion of the term of his employment less the amount earned or might, by reasonable effort, have been earned in the same busi-

ness during the unexpired term. This is the rule in all cases brought after expiration of the term of employment. But he should make a reasonable effort to secure other employment, for he cannot voluntarily remain idle at the expense of his employer. If the action is brought before the expiration of the term of employment, then the damages are those which have accrued to the time of trial.

CHAPTER XXXIV

WRONGS

1. Contracts sometimes prescribe the sum to be paid for non-fulfilment.
2. Redress for an assault.
3. An attempt with unlawful force is an assault.
4. When deception is equivalent to an assault.
5. When assault becomes a battery.
6. Accidental injury is not a battery.
7. Attempt to commit a battery may be resisted.
8. Words do not justify the employment of force in self-protection.
9. One may use force in protecting a member of his family.
10. Use of force to defend property.
11. Use of spring guns and similar devices.
12. Punishment by school teacher.
13. Redress for injuring one's reputation. False charges.
14. What is defamation:
    a.—Slander,
    b.—Libel,
    c.—How the imputation may be made.
15. How language is to be interpreted.
16. When defamation is published.
17. What is meant by publication.

18. Classification of spoken words that are a cause of action.
19. Imputation of criminal offense.
20. Imputation of infamous punishment.
21. Imputation should have a tendency to injure a man.
22. When defamation has an injurious tendency.
23. Effect of words that impeach title of a person.
24. Law of libel is broader than that of slander.
25. At common law there is no immunity for publishers.
26. Truth of charge is a defense.
27. How far this rule goes.
28. Belief in truth of accusation is no defense.
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30. Absolute privilege cannot be overturned by proof of malicious publication.
31. Absolute is confined to the state:
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32. Non-official publications.
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36. Honest statements in vindication of character publicly attacked.
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38. A requested communication is not necessarily privileged.
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45. Agreement in restraint of trade.
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48. Security against unreasonable searches and seizures
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52. Right of surface and subsurface owner to lateral support.
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54. Filthy deposits.
55. Discharge from leakage or bursting of water pipes.
56. Protection of land from surface water.
57. What is a watercourse.
58. Lower owner must permit water to pass.
59. Duty of municipalities in constructing sewers, etc.
60. Priority of appropriation confers no right except in mining states.
61. Right between adjacent properties.
62. Every proprietor is entitled to natural flow of stream.

1. Very often a contract prescribes the damage or penalty that may be visited upon the violator. This usually consists of the payment of a sum of money, or the restitution of the property, or both.

Although the wrong done, should a contract not be fulfilled, may be measured and fixed in advance by a stipulation to pay a certain sum of money, it cannot always be exacted. If a contractor agrees to pay one thousand dollars, for example, should he fail to execute his contract, and the real injury resulting from his failure was only half that amount, the courts often find a way of relieving him from paying more. In other words in some cases, indeed they are numerous, the law, notwithstanding the agreement of the parties, assumes authority to fix the amount that should be paid because justice requires this to be done.

2. The wrongs to be considered in this chapter include a large number outside the field of express contracts. By fundamental law every person is entitled to liberty, security of life, and the security and restitution of his property.[1] Thus, a person has a right to complete immunity from harm. An attempt to commit a battery often puts a person in fear, and this is an assault and a wrong, even though not followed by an actual battery. But a threat to commit an injury, though sometimes a criminal one, is not an actionable

[1] While the state may restrict its own right, it cannot take away the rights that are purely individual; even those are closely associated with the public right. Thus, no regulations of the right of navigation can lawfully take from a riparian proprietor his waterfront and the right to make use of it for the purpose of navigation. Again, no special privilege to make use of public waters can empower the beneficiaries to flood the lands of individuals.

private wrong. In other words, mere words do not constitute an assault.

3. Any attempt with unlawful force to inflict injury on another with apparent ability to make it effectual, if not prevented, is an assault. The raising of the hand with the apparent purpose to strike, the pointing of a pistol at a person within range of fire, are illustrations of assault.

4. Deception may sometimes be equivalent to force in an assault; for example, to put an explosive into one's hand without knowledge on his part of its nature, or to conceal a posionous drug in one's food.

5. A successful assault becomes a battery when the injury is actually done to a person in an angry, revengeful, rude or insolent manner. The wrong consists not so much in actually touching the person as in the manner and spirit of doing the act. Thus, to push gently against another in going through a crowd is not a battery; an insolent push would be.

6. An accidental injury is not a battery. On the other hand, the precise injury may be different from the one designed. The illustration often given is the throwing by mere recklessness of a missile into a crowd; a stricken person may have an action for the injury. Again, a blow unlawfully aimed at one person will give the right of action to another upon whom it may fall, though not intended. Another illustration, more frequent a year or two since than now, was that of the bicycle rider who carelessly ran against a pedestrian; this was an assault.

7. An attempt to commit a battery may always be

resisted, with the restriction that no more force must be employed than is needful to make one's self-defense effective. He must not inflict serious injury in repelling an attack which threatens him with slight injury. He must not take life or limb unless his own life or limb is in danger; not even then if he can safely retreat from danger.

8. As words do not constitute an assault, they do not justify the employment of force for self-protection. Words grossly insulting to a woman, or spoken in the presence of one's family for the purpose of aggravating them, may constitute a breach of the peace to such an extent as to justify one in employing force to put an immediate stop to the brutal talker.

9. Again, such force as one may use in his own defense may be used in defending any other member of his family. But this right does not go so far as to admit of taking revenge for a past wrong. For this, however slow the remedy may be, the injured person must invoke the law.[1]

10. An assault and battery in defense of property may be justified; the invader of one's property may be removed by force. This must be limited to the amount needful for the purpose. Again, force cannot be employed to recover a thing in another's possession, save in extreme cases.

11. To set a spring gun or similar device as a defense against trespassers, though not unlawful, might result in serious consequences were the trespasser seriously injured. The force might prove excessive, and

[1] See § 99 of this chapter.

subject the user to an action. The same principle applies in keeping a dog that is known to be ferocious, or in using means that are likely to inflict serious injuries without warning, as a defence against mere trespassers.

12. The reasonable punishment of a scholar by his teacher is proper for the preservation of order and discipline. In one of the recent cases the court thus set forth the law on this subject: A school teacher has the right to require obedience to reasonable rules, and proper attention to his authority, and to inflict punishment for disobedience.

In the absence of rules established by the school board or other proper authority, a teacher has a right to make all necessary and proper rules for the regulation of the school.

In inflicting corporal punishment the teacher must be governed by the nature of the obedience and by the age, size and physical condition of the pupil.

In punishing a boy who has been habitually refractory and disobedient, for a particular disobedience, the teacher must take into consideration his habitual disobedience. But he need not inform the pupil at the time that he is punishing him for past as well as present misconduct.

In an early and leading case on this subject the court declared that the welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limb or health, or shall disfigure the child, or cause permanent injury, is immoderate, and in-

consistent with the purpose for which it is authorised. But any correction which produces temporary pain only, and no permanent ill, is not immoderate, since it may have been necessary for the reformation of the child. When the correction is administered, and is not immoderate, and therefore not beyond the authority of the teacher, its legality or illegality must depend entirely on the quo animo with which it was administered. Within the sphere of his authority the master is the judge of the occasion requiring correction, and of the degree of correction necessary. When imparted with discretion he cannot be made responsible for an error in judgment, but only for wickedness of purpose.

The chastisement must not exceed the limit of moderate correction, and though courts are bound, with a view to the maintenance of necessary order and decorum in schools, to look with reasonable indulgence on the person of the pupil for two months afterward, excessive and cruel must be adjudged illegal. Nor is the master relieved from liability in damages for the excessive and unnecessary punishment of a scholar by the fact that he acted in good faith and without malice, both for the discipline of the school and the welfare of the scholar.

Whether the punishment in any particular case was excessive must be left for the jury to decide. "Any punishment with a rod which leaves marks or welts on the person of the pupil for two months afterward, or much less time, is immoderate and excessive, and a court would be justified in so instructing the jury." The pupil must also understand, and know, or have

the means of knowing, for what offence he is punished.[1]

13. The law secures to every person his reputation. Every false charge or insinuation made maliciously and causing injury to one's reputation is actionable. Furthermore, after the introduction of proof of publication, the burden of proof is generally thrown on the accuser. Every person is assumed to be of good reputation until the contrary is shown. Again, the charges or insinuations against him are assumed to be false. Attending this presumption is another that they were maliciously made. Lastly, when the natural effect is to cause injury, the law presumes this to have followed.

A person may sometimes have a bad reputation which is deserved, yet he may be wronged; thus, one may be charged as a thief who is only a vagabond. But a person is not wronged whose undeserved good reputation is destroyed by exposure.

14. A defamation is a false imputation on one's character or reputation in the way of slander or libel.

(*a*) Slander is defamation published orally or in like manner.

(*b*) Libel is defamation published by writing, printing or figure.

(*c*) The imputation may be made upon one as a man, or upon one in his vocation. Language that is spoken, or that is defamatory, is understood to be false.

15. In interpreting language its natural sense is regarded. It is not to be construed in a milder sense, though this may be possible. Such a construction

[1] 25 *Central Law Journal*, pp. 339-344, Heritage v. Dodge, 64 N. H., 297.

would be forced, and the law does not put a forced construction ordinarily upon it.

16. Defamation is published when one makes an imputation to, or in the presence of, another, or causes the statement to come to the notice of another. Publication made without authority is published only by the one making it.

17. Publication means the presence of someone who understands the language used. Says Bigelow: The damage complained of must, in all cases, have been sustained through the action of a third person. In no other way is it actionable.[1]

18. Spoken words as a cause of action have been classified as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some infectious disease, which, if the charge is true, would exclude the party from society. (3) Defamatory words spoken of a party which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

[1] § 294, p. 154 (Seventh Edition).

19. Different rules prevail in the different states concerning the imputation of an offense. In some states, unless the offence charged is indictable, involves moral turpitude, or is infamous, there is no right of action against the utterer without proof of special damage.

20. A punishment is infamous at common law which disqualifies the offender from acting as a witness in the courts, but a trivial offense, such as vagrancy, begging, fortune-telling, and the like, is not infamous. In such a case, therefore, there can be no action against the person who has uttered it without proof that he has sustained special damage.

This is not the law everywhere. In some of the states an action may lie for an offense which is punishable and disgraceful. Thus, Bigelow says: "Whenever a punishable offence has been charged, which, though not ignominious, would bring disgrace, the accusation, if false, is actionable per se; the offence need not be indictable." [1]

21. An imputation to affect a man injuriously and be actionable should have a natural tendency to harm him in his occupation. That it may possibly injure him is not enough. Thus, a defendant published of a plaintiff who was clerk in a gas-light company: "You are a disgrace to the town, unfit to hold your situation for your conduct with bad persons." The plaintiff could not recover without proving actual damage, as the language did not have the tendency to cause the plaintiff's discharge from his employment. Had he

[1] § 298, p. 156.

been discharged in consequence, though the statement was not correct, he could have recovered damage.

22. Defamation has a natural tendency to injure a person in his office or business when it strikes at his qualification for performing his duties, or declares some misconduct or negligence in the course of transacting his duties, or alleges business embarrassment, or want of credit in the case of a merchant. Thus, should one declare a clergyman to be a swindler, or a lawyer a dunce, these would be actionable words.

23. Words that tend to impeach the present title of a person, though regarded as slanderous, are governed by special rules. As cases of action for defamation of this kind are rare, they need not be considered.

24. The law of libel is broader than that of slander. Many words that are written or printed become actionable in themselves which, orally published, would not be actionable without proof of special injury to the person against whom they were uttered. There is a whole class of defamatory representations by figure and effigy which are incapable of oral publication. Thus, a person who writes and publishes the following: "I sincerely abhor the man that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically and with the grossest impunity deals out his malice, uncharitableness and falsehood," is guilty of a libel.

25. At common law, for the proprietors of books and newspapers, there is no immunity. They are liable for the publication of libelous matter, though made with-

out their knowledge, or even against their orders. This is not true of news vendors. If an alleged libel were of such a nature that a man of common intelligence could not know that it was intended for a libel, and it was not in fact thus known, neither the editor nor the proprietor of the printing establishment nor of the print would be liable.

26. The truth of the charge, unless a statute prevails to the contrary, is a defence to an action for damages for the publication of an alleged defamation, though it was malicious and not reasonably believed to be true. A person has no right to a false character, and his real character suffers no damage which the law recognises from speaking the truth.

27. This rule goes so far as to justify one in publishing of another the fact that he suffered the penalty of the law for committing crime, even though he may have been pardoned, and has since lived the life of a respectable citizen. Thus, a newspaper published a statement concerning another that he had several years ago stolen an axe. Thus was true, though after a conviction the thief was pardoned and blossomed into a trusted citizen and an office holder. Since he had actually been convicted, the law justified the statement.

The truth of an effigy, figure or sign, so far as it may relate to the physical person of the party intended and not to his character, is no justification of a malicious publication. As Bigelow says: "A man is not responsible for his physical peculiarities, and may well invoke the protection of the law against one who may parade them before the public."

28. Belief in the truth of an accusation is not a defense; this, though, may be shown in mitigating or lessening the damages.

29. There are many occasions on which communications are said to be privileged to which different principles apply. Privileged communications are of two kinds. Those absolutely privileged, others which are prima facie privileged.

30. An absolute privilege cannot be overturned by any evidence that the publication was made with malice. A prima facie privileged communication may be overturned by such evidence.

31. Absolute privilege is confined to the three departments of state—legislative, executive, and judicial —and is justified on the ground of necessity.

(*a*) Whatever is said orally or in writing in the course of judicial proceedings is deemed to be a privileged communication. For example, a counsel for a criminal in the course of his argument may make base insinuations against the prosecutor which would be actionable were they not privileged. A witness on the stand volunteers a statement in vindication of himself, containing a charge of crime against a stranger to the trial. This charge is not actionable. Formerly the relevancy of such a charge was not regarded as absolutely privileged unless it was legally relevant to the matter before the court. This doctrine has of late years, especially in this country, been set aside.

This privilege extends to affidavits made in the course of a trial, and to many other matters connected with the trial itself. The law has been thus generalised

by an eminent English writer: "No action, either for slander or for libel, can be maintained against a judge, magistrate or any person sitting in any capacity over any court—judiciary, military or naval—recognised by the constitution according to law, nor against suitors, prosecutors, counsel or jurors for anything said or done relative to the matter in hand in the ordinary course of judicial proceedings, investigation or inquiry, civil or criminal in such trial, however false it may be."[1]

The proceednge of the courts of justice with some exceptions are under the eye of the public, even though attended by only a very few, and it is proper that their proceedings should be made known generally. Accordingly the publication of proceedings in open court, if sufficiently full to give a just and correct impression of them and are not attended with defamatory comments, is prima facie privileged. If given in a form so incomplete as to give a wrong impression, or they are followed by comments containing defamatory matter, the privilege fails and the publishing editor and authority is liable for defamation.

The publication of a fairly abridged report of a trial, conveying a just impression of what took place and without objectionable comments, is privileged.

The objection to defamatory comments also applies to the heading of a report. For example, should a newspaper print a report of a trial against an attorney, and head the same, "Shameful conduct of an attorney,"

[1] Starkie, cited by Bigelow, § 325, p. 167.

the publication would not be privileged. The editor may use a heading properly indicating the nature of the trial, not embodying or implying a comment.

The privilege appears to extend in England to the publication of ex parte judicial proceedings. It also protects the publication of preliminary and final proceedings in open court.

(*b*) The same privilege applies to the proceedings of the Legislature. The occasion is regarded as an absolute justification for the use of language, which otherwise would be actionable, while relating to legislative business. No member of such a body is liable legally for anything said by him in transacting the public business, however offensive it may be to the feelings or reputation of another.

This privilege is absolute only within the walls of the House, or within rooms occupied by its committees. It is not personal, but local. A member, therefore, who slanders or libels another outside such locality is just as guilty as any other individual.

(*c*) The same principle applies to persons who present a petition to the Legislature.[1]

32. It is obviously to the advantage of the public that true accounts of legislative proceedings should be placed before the people. On this principle, therefore, the publication of such proceedings by anyone is privileged, though they contain defamatory matter, but this privilege does not cover non-official publications.

33. No privilege is conferred, apart from statute,

[1] Communications made to the proper public authorities seeking a redress of wrongs fall within the same kind of absolute privilege.

on the proprietors, editors or publishers of public prints for the publication of defamatory matter uttered in public meetings, even though they are held under legal authority. Thus, should a newspaper print an account of a public meeting of commissioners of a town, and the report be fair and truthful, yet if defamatory language were uttered concerning a person at the meeting, the newspaper would be liable for publishing it. The case is not one of privilege, even though the defamatory statement relate to a matter of great interest to the public.

34. On other occasions there is only a prima facie privilege. Proceedings before large organisations, societies, clubs, and other volunteer bodies especially may be mentioned. The proceedings of such bodies for the discipline of their members partake somewhat of the nature of trials. Generally, language used in conducting them is privileged prima facie, so far as it is pertinent to the matter under consideration. For example, a defendant, while on trial before a committee for alleged falsehood and dishonesty in business, says of a plaintiff: "I discharged him for being dishonest, for stealing." He is not liable in the absence of evidence that he was actuated by express malice.

35. The use of public prints is sometimes justifiable to protect a person against the fraud or attack of a private citizen. Thus, a baker, employing servants in delivering bread in certain towns, inserted in a newspaper published in one of the towns a card stating that A having left his employ, and taken on himself the privilege of collecting his bills, this was to

give notice that he had nothing further to do with his business. This was a legal and justifiable step.

36. Honest statements made to the public in vindication of character publicly attacked are privileged prima facie when made through the proper channel. Thus, B published in a newspaper a reflection on A's character, who in reply published an article assaulting B's character. The defense was acting honestly in defending himself and his communication was prima facie privileged.

37. Communications by a master in regard to the character or conduct of his servant to a neighbour who is thinking of employing him fall within this category. Thus, a person having discharged his servant for misconduct and learning that another is about to engage him, writes to inform him that he has been discharged for dishonesty, and that he cannot recommend him. The charge of dishonesty is false, but is believed by the other to be true. The writer has a prima facie right to make such a statement.

The same principle applies in communicating with a very near relation. Thus, a partner may advise a co-partner to have no partnership dealing with another on the ground that he is a thief.

In most of these cases the communication is volunteered. This fact has no bearing on the question of liability. Some evidence of malice may be drawn from the facts, nothing more.

38. On the other hand, a communication is not necessarily privileged because it is made on request. Should it be unnecessarily defamatory the privilege, if there

be one, would be lost. Such a fact would show that the writer or speaker was actuated by malice, and would thus destroy the protection that was available to the party and restore to the plaintiff his right of redress.

39. Besides cases of self-vindication the subject of prima facie privilege may be summed up in the following general rule: A communication believed to be true and made bona fide upon any subject, in which the party communicating has an interest or a legal or moral duty to perform, is privileged if made to a person having a corresponding interest or duty, although it contains defamatory matter.

40. Criticism is not defamation unless partaking of a personal character. It is protected, therefore, not because it is privileged, but because it is not defamatory; in other words, is not wrongful.

(*a*) Criticism of works of art, paintings, sculpture, and the like falls within the rule; thus, a person says of a picture placed on exhibition: "It is a mere daub." If this be a fair criticism the sayer is not liable for defamation.

(*b*) The conduct of public men amenable to the public only is a proper matter for public discussion. Bigelow says this "may be made the subject of hostile criticism and animadversion so long as the writer keeps within the bounds of an honest intention to discharge a duty to the public, and does not make the occasion a mere cover for promulgating false and defamatory allegations. The question in such cases, therefore, is whether the author of the statement complained of has transgressed the bounds within which

comments upon the character or conduct of public men should be confined; whether, instead of fair comment, the occasion was made the opportunity for gratifying personal vindictiveness and hostility, as by making false charges of disgraceful acts. . . . Criticism of public men should be limited to matters touching their qualifications for the performance of duties pertaining to the position which they hold or seek." [1]

41. Another wrong is that of false imprisonment, which consists in imposing by force of threats an unlawful restraint upon a man's freedom of movement. Merely turning one aside, however, from the way he is going does not constitute such an imprisonment.

The justification for false imprisonment is often made out when parties stand in certain relations to each other—as parent to child, guardian to ward, master to apprentice, teacher to pupil. We have already shown elsewhere the rights between these respective parties in this regard.

The charge of false imprisonment when made against a ministerial officer is often met by showing that he was justified by law in doing what he did. In attempting to justify himself in this manner he must show that the process was issued by the court or officer clothed with proper authority, and that in no respect was authority wanting for the course he pursued.

42. Another wrong is a malicious prosecution. This is the instituting of a suit without probable cause therefor, resulting in the acquittal or discharge of the accused. Probable cause involves a consideration of

[1] § 360, p. 181.

the facts and reasonable deductions from them. The inquiry, therefore, is a mixed one of law and fact.

That a party acted on the advice of counsel is always a material fact in his favour, provided the action was taken after a full and fair disclosure of all the facts and the advice of competent counsel.

43. The want of probable cause will not be presumed. This must be shown. The existence of malice is not proof, for this might be the result of the wrong of which complaint is made. An acquittal by a magistrate possessing proper authority is evidence of the want of probable cause, but is not conclusive evidence. If the party prosecuted was convicted in the lower court, but acquittal on appeal, the conviction will be held conclusive of probable cause.

(*a*) The burden of proving that the prosecution was malicious is on the plaintiff. Malice in a legal sense is made out by showing that the prosecution was instituted from any improper or wrongful motive.

(*b*) The prosecution must have come to an end before a suit for its malicious origin can be begun. In general, the acquittal should be final. A discontinuance or a compromise will not suffice, but a dismissal will, even though on technical grounds.

44. Though one has a right to refuse to serve another, he has no right to prevent by compulsion others from employment. A society of men may lawfully unite in agreeing that they will not labour with others who are not associated with them, but they become wrongdoers as soon as they interfere with the liberty of

others.[1] Consequently, acts done in the pursuance of a conspiracy may be unlawful if they include deception, threats, intimidation or any kind of force, whether employed on the labourer or employer. On the other hand, employers who combine and employ unlawful means to prevent the employment of any class of labourers also violate the liberty common to all.

An act done by one alone is but a civil injury, but it assumes an aggravated character when effected by the powers of combination. An agreement to effect an injury or wrong to another by two or more persons constitutes an offense, because the wrong assumes a formidable character.

"Any man," says Judge Pardee, "(unless under contract, obligation, or employment charging him with a public duty) has a right to refuse to work for or deal with any man, or class of men, as he sees fit: and this right, which one man may exercise singly, any number may agree to exercise jointly." On the other hand employers have a similar right to combine to resist employees. A strike or boycott, therefore, may be a legal movement, if not conflicting with a contract obligation. "We are not prepared," said Justice Harlan, "to hold that a combination among employees, having for its object their orderly withdrawal, in large numbers or in a body, from the service of their employer, on account simply of a reduction in their wages, is neither illegal nor criminal. But," he added, "a

[1] Conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful end which is injurious to another. To induce a person by means not lawful to refuse to engage in service is not illegal, but to break up a service actually begun is legally wrong. A conspiracy to break a contract for the delivery of property is not a legal wrong. See Chap. V., 26.

combination of two or more persons with a power to do an injury they would not possess as individuals acting singly, has always been recognised as in itself wrongful and illegal."

Judge Taft in a famous case between two railroad companies said:[1] "Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves, and considered singly, are innocent, when the acts are done with malice, i. e., with the intention to injure another without lawful excuse."

A boycott is an actionable wrong. "Lawful competition in business may damage another without creating a wrong, but trades unions are not ordinarily competitors of the persons against whom a boycott is directed. The purpose of the boycott is, by a combination of many, to cause loss to one person by coercing others, against their will, to suspend or discontinue dealing or patronage because of his refusal to comply with demands of the boycotters. This is a totally different thing from that competition which is the life of trade." The boycott of a newspaper,

[1] 154 Fed., 730.

therefore, including threatening circulars, designed to stop advertisements and decrease circulation, is an actionable wrong.[1]

The protection of one's ligitimate interests is not an unlawful object, and a combination of workman joined to secure an advance in wages, shorter hours, protection against incompetent co-workers, or other similar objects is not illegal. To insist that an entire job be given to members of the union and that no part be given to non-members, is lawful. On the other hand, a purpose which the law will not recognise as

[1] Jaggard in his work on Torts contains the following review of cases:

In Bohn Manuf'g Co. v. Hillis it was held that a voluntary association of retail dealers could agree not to deal with any manufacturer or wholesale dealer who would sell direct to consumers, and, in accordance with such agreement, notify all members whenever any wholesale dealer or manufacturer made any such sale, without committing an actionable wrong, or creating a basis for the issuance of an injunction. Here the conduct of the retailer's association may have been justified by the exercise of equal rights. It was an effectual check on dangerous competition. Moreover, in this case, as in the cases in which the right of men to quit the employment of their master is recognised, there was simply the exercise jointly of the right any man has to deal with those he chooses, and to quit working whenever he chooses, in the absence of such particular circumstances; as, for example, where there is an attempt to influence the conduct of persons outside of the association. In Delz v. Winfree the court recognised as correct the proposition that a person has an absolute right to refuse to have business relations with any person whomsoever whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property, but added: "The privilege here asserted must be limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motive influence another person to do the same thing." Accordingly, while it was held that no action for conspiracy would lie for refusal on the part of several dealers in cattle to sell to the complainant (a non-paying customer), yet such action would lie if they induced another dealer, who likewise refused to sell to him. And in Temperton v. Russell it was distinctly held that a combination by two or more persons to induce others not to deal with, or to enter into contract with, a particular individual, is actionable, or done for the purpose of injuring that individual, provided he is thereby injured. The courts, however, regard as actionable wrong any attempt to secure a monopoly of business by coercion or intimidation by combinations. From this point of view, Bohn Manuf'g Co. v. Hillis has been criticised as in conflict with approved authority, and as being bad as a precedent.—Vol. I., p. 45, 46.

self-protective cannot serve as an excuse. For instance, the object is illegal if it be to prevent a non-union workman from securing employment, or to compel an employer to pay a fine imposed on him by a union of which he was not a member, or to force the discharge of an unpopular foreman. Another situation is a strike, or threat to strike, against A with whom there is no dispute, because A works for B with whom there is a dispute, for the purpose of forcing A to force B to yield. This passes beyond a case of competition. It is but fair to limit the right of coercion and compulsion to strike against persons with whom there is a trade controversy. Here an outsider is brought into a contest who would otherwise have remained neutral. This analagous to what a sympathetic strike, which clearly should be regarded illegal, as should likewise a combination to blacklist when directed against persons with whom those combining have no trade dispute.

It is now well settled that where no breech of contract is involved, as the employer may hire or discharge as he sees fit, so may the employed refuse or cease to work, whether it be for a good reason, a bad reason, or no reason at all. From this springs the doctrine sometimes asserted that what one man may lawfully do may be done or threatened by many. But this ignores the coercive force of numbers. The increase of power by combination is in gemetrical proportion to the number concerned. The force of a combination is something more than the mere sense of the individualities that compose it. A grain of gunpowder is harmless, but a pound may be highly

destructive. True, all acts done in combination cannot always on that ground alone be deemed unlawful. But the greater power to harm cannot be ignored and inquiry will be justified into the motives of the actors.

45. An agreement among employers in the same line of business to suspend or carry on business, as the majority shall agree, is void, because it is in restraint of trade. This is an ancient principle and is having an unexpected application in these days. As we shall soon see, many of the combinations recently made for uniting business and stifling competition are entirely opposed to this principle. Indeed, it may be questioned whether the violations have not become so general as virtually to make a dead letter of the rule.

46. Lastly, an agreement between labourers whereby they will not seek work at a shop where disputes connected with their trade have arisen, will not encourage or work with a labourer contrary to rules formed by their association, is condemned by the law for the same reason.

47. Religious liberty is guaranteed to every man by the fundamental law. So long as voluntary religious organisations do not interfere with this law they are permitted to have their own way. But when they disregard the fundamental law by expelling their members in an unlawful manner, or by doing things not recognised by the fundamental law, then indeed the law seeks to correct the wrong. Thus, a person who is expelled from a society without proper trial would have a right to complain, and a court of justice would look into the mode of his expulsion and determine

whether the proceedings were fair and proper, as quickly as in other cases of a wrong inflicted on a member of a society.

Every person, therefore, is entitled to have his rights tested by the general laws. Thus, Cooley says, the liberty of a pauper cannot be entrusted to the discretion of an officer of the poor or other ministerial or administerial officer.

48. By national and state constitutions all persons are secure against unreasonable searches and seizures of themselves and of their property. The offence is criminal wrongfully to open another's letters, likewise to retain to pry into them. Correspondence by telegraph is in principle surrounded by similar security. But persons through whose hands telegrams pass may be compelled to produce them in evidence, and to testify concerning them in courts and before legislative commissioners.

49. Search warrants are issued to discover stolen or smuggled goods, and in a few other cases an officer is justified in searching on private premises. In executing a warrant an officer cannot seize other goods or search other buildings than those described therein, but he is not liable as a trespasser should he unintentionally seize the wrong property which answers the description.

50. An action may be maintained against a person who commits a nuisance. This is a term with a very wide meaning. It has been defined as anything wrongfully done or permitted which injures or annoys another in the enjoyment of his own legal rights. Nui-

sances that may be the subject of an action will now be described.

51. The right of lateral support by adjoining land is a principle of the common law existing independently of contract. To remove or to weaken such support is a nuisance. A person, therefore, who is improving his own land and making excavations which would endanger the walls of his neighbours must supply supports of some kind; in other words, must keep the walls intact, or be responsible for the injury attending his neglect.

In England the right to lateral support for land weighted with buildings is regarded as an easement. In our country this rule does not prevail.

52. Sometimes one man owns the surface of the ground and another the subsurface. The law clearly sets forth the rights of both. With no contract between them the owner of the surface is entitled to support for the land itself and the buildings thereon. If the subsurface owner removes the natural support he must substitute something to protect the surface. To work a mine without providing such support is unreasonable and unlawful.

53. Any part of one's building extending over another's line is a nuisance, even though no damage is suffered or anticipated; it is an intrusion, or trespass. Its insignificance simply affects the damage that can be recovered; the nuisance none the less exists.

Every owner of land is entitled to have his soil in its natural state supported by the adjoining land. A landowner who removes his own soil supporting the

higher land of an adjoining proprietor, and erects a retaining wall wholly on his neighbor's land, may or may not be guilty of trespass, depending on the answer to the question, whether the invasion of the adjoining land was with his neighbour's consent or not. In either event the obligation to maintain the wall does not run with the land of the lower proprietor. The result would be different had the wall been erected by the lower proprietor on his own land. Then the obligation assumed would have become a charge on his land, at least so far as the maintenance of the wall was necessary to preserve the rights of the upper proprietor.

54. Filthy deposits on one's premises which percolate through the soil or into a neighbour's cellar, or find their way into wells are a nuisance. The law clearly imposes a duty on everyone to exclude filth of every kind from his neighbour's land; not to do this is negligence. Accidental percolation only would excuse the owner of the premises from which it flows.

A riparian proprietor also commits a nuisance by casting into a stream the refuse of his business, which is carried and deposited on the land of a proprietor below. The wrong in this case consists in putting the rubbish into the stream; the deposit on the land below is only the consequence from which the cause of action of a particular individual arises.

55. The lawful user of water pipes on his premises who injures another by their bursting or leakage is responsible for the consequences. He is especially liable should he fail to observe due care in protecting the pipes against these defects.

56. In like manner, while one may lawfully collect water in a reservoir on his premises for useful and ornamental purposes, yet this must be done in proper manner. Should the reservoir through negligent construction break, and injure the surrounding proprietors, the owner would be responsible for the consequences.

One may erect a barrier to prevent surface water from coming on his land without incurring liability to the upper proprietor upon whose land the flow would be increased, or to the lower proprietor by depriving him of the water which otherwise would flow upon his premises.

A different rule applies to a natural watercourse. This must not be stopped and the water turned back on the lands of another proprietor.

Again, one may drain his lands into a natural watercourse, even though a lower proprietor is injured by the increased flow. On the other hand, the lower proprietor can erect any such protection as may be needful to guard his lands against the additional flow, provided it does not interfere with the natural passage of the water.

The creation of a building of any kind concentrates a quantity of rainfall and gives it a new direction. The owner is therefore required to prevent the flow of water thus caused from inflictng greater injury on the adjoining owner than would happen from the rain falling on the ground in the former manner. He has no right to let the water drip from his roof upon his neighbour's premises, nor even to let it drip upon his own land in such manner as to overflow his neighbour's